Land	200.00
House	125.00
covered. Waggon	60.00
ox. waggon	60.00
3 old waggon.	30.00
Yoke oxen	65.00
2 cows.	40.00
3 tons english hay	45.00
1000 clapboards.	40.00
other lumber	50.00
1 sleigh	5.00
	720.00
100 bushels potatoes.	30.00
2. Pigs	10.00
1 Barrel Beef.	10.00
Ephraim Collins furniture	20.00
	790.00
Life estate	100.00

1834 4 16
0 6 16
1
8 20
5 12

21,00
42
21,42

1834 10 15
3 14

67,00
67
33
14
60,14

38,70
1,10
9
37,04

[Gould, James]

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Municipal Law

The word Law in its most comprehensive sense, signifies a rule of action, prescribed by some superior: and ys is predicable of all kinds of action.

By the Law of Nations is meant, that Law. wh Nature prescribes to Nations or Sovereign States - Quod natural rates inter homines constituit -
But Municipal Law, of wh tis my present purpose to treat, has been defined. "A Rule of civil conduct prescribed by the Supreme Power of a State commanding what is right and prohibiting what is wrong.

This last part is Surplusage: and tis different from what is called Natural Law, wh is a Rule of Moral conduct and is binding upon the whole human family Whereas Municipal Law regards its subjects as members of a Society or Community, regarding only those rights which arise in Society. "Pus Civile est, quod quisque Populus sibi constituit - (or better) quod quisque sibi Populus constituit And hence the difference is. Municipal Law is a Rule of Civil conduct - Natural Law, the rule of Moral conduct.

This Rule to correspond with the Definition before laid 2
down, must be Permanent. Uniform and Universal
By Permanent ant meant Perpetual and Immutable - but that it is a constant Rule and not an occasional one 1e. continuing either indefinitely or for a certain period of time.

By Uniform is meant that tis General in its operation as far as it extends -

By "Uniform" is merely meant, that it shall be General in its operation as far as it extends.

By Universal is merely meant, that it shall be General

4. within its own limits, for local usages or Laws which prevail only within one part of the Kingdom, may constitute a part of the Municipal Law. 1. Bl. 44.

Retroactive The Definition requires that this Rule be promulgated, and yt it shall not be retroactive, by wh is meant, a Law wh affects transactions wh took place before ye Law itself was enacted. But there is a material difference between a Retroactive Law or a Retrospective law, and those Laws wh are deemed "Ex post Facto"

3 Dall 348. 386. 391. A Retrospective Law is any, wh relates to Civil or Criminal cases, wh has a retroactive operation - Whereas an "Ex post Facto" Law is applicable only to Penal Laws. Retroactive is a Genus of wh "Ex post Facto" is a species. The latter are always Penal Laws, ye former are either Penal or remedial. It often happens that both have a retroactive operation, tho ye definition of Municipal Law virtually prohibits it.

Constitution of U. S. This prohibits ye Legislatures of ye Several States passing any "Ex post Facto" Laws. by Art 1. Sec. 11. This subject is well explained in 3. Dall 386. 391. The Rule must be prescribed by ye Supreme Power of ye State, by wh is meant ye Legislature. or a Lawmaking power. and yis power necessarily involves the right of repealing. 1. Bl. 46. 90. Bl. has laid down Rules as to ye interpretation of Laws. 1. Bl. 59. 61.

Construction of Laws. First words are to be understood generally rather their most popular signification
Terms of Art rather to ye interpretation of yem by ye learned in yt Art. or in C. L. Technics, "Cuilibet in sua Arte credendum est" 1. Bl. 59. 61. 4. Bac Ab. St P. 4.

Second. When words are ambiguous, tis proper to consult ye Context and thus establish their meaning by their connection and also to compare the Law to other Laws relating to the

to ye same. By ye mode words "in se" dubious, are often rendered clear and intelligible.

Third. Words are always to be understood with reference to ye subject matter. Fourth ye effects and consequency of different construction are to be regarded.
Fifth. The last. and that wh is "Instar omnium" and to wh the foregoing are subordinate. is. That ye reason and spirit of ye Law is ye Law itself. "cessante ratione legis cessat lex" is a maxim of C. Law, and (with ye exception to ye Penal Laws) when discovered conclusive in all questions of Construction. The reason and Spirit of the Penal Laws may be consulted to take a Party out of ym, but when he is without the letter, he can never be brt within the Spirit.

From ys great Cardinal Rule, arises what is called ye Equity of ye Law and its apparent yt no other Construction can comply with ye intention of ye Lawgiver, for it is self evident, that ye Reason and Spirit constitute ye essence of the Law and not the moral Equity in its common acceptation. Co Litt 24. B. 1. Bl. 62. 3. Bl. 431.

Municipal Law is devided into Lex Scripta and Lex Scripta. The Unwritten Law includes not only General customs, properly so called 18. C Law, but also particular Customs of Certain parts of the Realm. and likewise those particular Laws yt are by Custom observed only in certain Courts and Jurisdictions 1. Bl. 63. 67.

The C Law is sometimes used as synonimous with ye Unwritten Law, but improperly for such is only a branch of the Unwritten Law. wh includes three branches. The C. Law. Local Customs - Particular Customs or Laws.

The Unwritten Law is a Genus of wh ye C Law is a species The Unwritten Law is so called, because its original

o. institution is not set down in writting, like an Act or St 12. it doth derive its force, from an authoritative writting record or Role, but from immemorial Usage, "whereof ye memory of man runneth not to ye Contrary". 1. Bl 64. 57.

The first and most important branch of ye Unwritten Law is the C Law, "wh is defined to be "Rules of Civil conduct" founded on General Custom, and extending throughout the whole Realm or Community: as contradistinguished from Local Customs, or it is called C Law either to distinguish from other Laws as St, Cannon. Civil Laws. or because ty common to the whole Realm; ty mentioned by Edward the Elder after ye abolition of Provincial Customs and by Alfred.

Customs. wh are ye foundation of ye C Law must be
1 Bl 68. immemorial. A custom to be immemorial must extend back
2. Do 31. beyond ye time of Legal memory. wh in Eng is dated from ye
2. Role 269. accession of Richard 1st (1189) So yt no Custom has ye
5. effect of Law, nie it has existed without interruption from yt time. but ye positive rule regulating ye extent of Legal memory cannot apply to us.

But if ye C Law be unwritten where is it, or any branch of ye unwritten Laws to be found. Bl answers ye inquiry "Yt it is to be sought for in the Records of Cts of Justice
1 Bl. 63.4. in books of Reports and Judicial decisions and in the Treatises of ye learned Sages of ye profession. 1. Bl 68. 2. Do 31. 2 Role 269.

These doth "per Se" constitute ye body of ye "Lex Non Scripta" or C Law, as ye Roles of Parliament do or are ye St Laws. for if they were ye Law. it wd then be written Law and a Judicial Decision could no more be overruled, or questioned yn a St. But ye is contradicted by daily experience and there is no importunity in overruling them, but they are "Prima Facie" Evi of what ye Law is and always have been so considered. 1 Bl 63. 70. 71.

These laws were expounded or ascertained by y Judgs of y C.
of Justice, y depositories and Oracles of y Law?

By y term "Precedent" is meant a former Judicial Decision on y point in question and is, only Evi of what y Law is — It is a Gen Rule, however, yt a Precedent must be followed, 1. B.C. 697
ni plainly absurd, or flatly unjust, and not to be overruled, merely quia y reasons of it aint discovered — It is authoritative and binding, ni shown to be absurd and unjust, and he who objects to y Precedent or law of it, takes y "onus probandi" on himself and must show its fallacy, absurdity or Injustice — In y o country we have a right to overrule all determ-
-inations in y Eng Law — yt are clearly unjust — but farther yn yo wd overthrow y whole System of Jurisprudence — This is so indispensible to y preservation of uniformity in y System, yt J Bull says "stare decisis" et non quieta moveri is y most important maxim of y Law —

But how did y C Law come into existence? In point of fact, it was built up by y successive Judges of Westminster Hall. They were in fact y Lawgivers — This theory may seem not to answer y objection naturally arising out of y definition. "yt y Sovereign Power is wanting", but y answer to yo is, Gen Usage sanctioned by adoption —, for no number of Jts however able they may be, can administer Justice without y aid of y unwritten Law.

There are many doctrines of y C Law, wh in point of fact, have originated since y accession of Richard II — 1189 — as y doctrine of Escuatory devises — wh was introduced in y Reign of Eliz, and indeed y Mercantile Law was never fully understood, till y time of Ld Mansfield —

These decisions, in new cases, then, do not create Law — but merely promulgate it 1st. They are only regarded as Evi of what y Law immemorially was, and wd have been declared y same had y question originated before y time of Richard —

First —

The Unwritten Law by itself merely, never can furnish a complete remedy in y most simple Statutory provision, and y Cts yt shd thus be called upon to carry y Law into effect. and must make an unwritten Law "pro re nata" or adopt one. I will Illustrate ys by one Example –

Suppose y unwritten Law unknown, and a St made giving a Person remedy for an Assault and Battery, now a proceeding must be devised to carry it into effect, seeing there is no knowing how y remedy is to be recovered –

Suppose y it provides for a recovery by action, The question then presents itself, what is an action? St says Trespass? What is Trespass? St defines it – How is it to be framed – By Writ? What is a Writ – If there any things more provided by St, what are they – as Pleadings. Issues, and how are they to be tried? Indeed from y commencement of Mesne to y return of Final process, without an unwritten Law made or established as they proceed, y Cts cd never regularly administer Justice –

Unfortunate to ys view has y fact been; yt entire branches of y Law have been brought into existence, long since Richard 1st and are immemorial, because they are Evi of what y immemorial rights of perfect obligation now are, and what they have always been –

Particular Customs are constitute y second branch of unwritten Law, are local usages, not common throughout y whole realm, Statute, but confined to Local Limits –
1. Bl 74.
2. Do 263
These in Eng are probably y remains of those provincial Customs, out of wh. C L was first collected by Alfred. An there are any particular Customs in y U S, is doubtful –

Particular customs are not regularly recognized on Cts of Justice, as they are not presumed judicially to know, you – not being Public or Gen Rules –

When such is to be made a ground of claim or defence, it must be Specially pleaded - 1E. it must be cited in y Declar or Plea, and its existence must be proved, as a matter of fact to y Jury, like other matters of fact, nisi y same has been before determined in y same Court - (& recorded) in wh y question again arises, in wh case any further enquiry is precluded. Doug 365.

Co Litt 175
Litt Rep. 2. 65.
1. Bl. 76.
Doug 36.
1 Bl. 76.

But y Customs of Gavelkind and Borough Eng are Excepts to y last rule 1E they need not be proved, being notorious throughout y whole realm - They ~~must~~ need not be Specially pleaded -

Co Litt 78.
1 Bl. 75.

Obs

That Sir Wm Blackstone shd have asserted yt y Law Merchant is a particular custom (tho in his first Book, he does so call it) seems very remarkable -

But ye proposition is certainly incorrect, as it is not in any one sense, nor has it a single trait of yt class of ~~Cases~~ or Laws. It is indeed confined to particular subjects, but yt no more constitutes it a particular custom, yn y law of descents, wh is confined to particular subjects, and relates only to heirs - The truth is, ye Law Merchant, tho' governing particular transactions, is a customary Law, extending throughout y whole realm, wh of itself shews yt it is a branch of y Gen Common Law of y Land and need not be specially pleaded -

1. Bl. 75.
2. Bl. 459-
4 Co. 57
3. T. 466
Chk on Bills 13.
Salk 130.
1 Bl. R. 198 - 2. Burr. 1216. 18. 22. Chitt 28. 109 -

Moreover y Law Merchant ant attended with y incidents of particular customs; for it need not be specially pleaded - nor tried by a Jury or proved by witnesses -

It is however said yt if new cases arise in wh it is doubtful, it may be proved by witnesses - But yo ant Evi to be offered to a Jury, to prove a matter of fact tho' it has been so sett, - and I think contrary to principle - but y Ct may take y Evi of skillful merchants, as to what y usage of merchants is - when they themselves are in doubt - as they wd consult a dictionary for y meaning of ambiguous words -

vide Pickron the lower lines of authority.

There however must be new cases in wh y law is doubtful.

Bl says to make a particular custom good, y following
Co Litt 113 are necessary requisites — 1. Immemorial — 2d It must
114. have been continued 3d It must have been peaceable —
Litt S. 212. Fourth They must be reasonable or not unreasonable —
9. Co 58. Fifth Certain — Sixth Compulsory when established —
Bl. 77. 78. and Seventh and lastly they must be consistent with each other —

1. Bl 78. 78 Particular Customs in derogation of y C Law. must be construed strictly. IE. they cant be extended by construction —

Certain particular laws adopted by custom and used only in particular jurisdictions & cts, constitute y third branch of y unwritten law IE. y civil and ecclesiastical Law —

Particular customs are confined to local limits, but particular laws are not — It is immaterial where y cause of action arose, provided it is brot in one of those Cts, in wh those laws are adopted IE. y Military, Maratime, Ecclesiastical, and academical in Eng, wh have adopted y civil and Canon Laws. IE y civil and ecclesiastical Laws of the Empire —
1 Bl 67. 79. 80. 82. 83.

In y s country there are no ecclesiastical Cts, The Maratime Laws are adopted in our Prize Cts, not only in its decisions, but its rules of Evi —
I presume the Eng. y civil and Canon Laws possess no original force in Eng — but they have become a part of y C Law by adoption — wh may be either by immemorial usage, where they form a part of y unwritten law in y above Cts — or by a legislative act, when they become a part of y written law of y land —
1 Bl 79. 80. Sackers Bl 411. 29.

The C Law of Eng and y ancient Sts are "Prima Facie" y law of yr country, but they derive their force by a similar sanction IE. by adoption or legal provision, for I absent

yt y Civil or Canon Laws as such, are unknown in ~~ang~~ our country, tho' as far as they are incorporated with y Public Law or Laws of Nations, they may be here known: but as y Laws of England they have no more inherent force, in yr country, yn a Roman Code wd have in England — They are binding in no other sense; yn y Com and St of Eng are binding - viz by Adoption —

Courts Stds in y Union have adopted particular branches of y written Law of Eng, and whenever yr in y case, they are binding by force of yr Legislative proceeding and not by any innate authority they possessed.

They are thus made a part of y written Law" of y Land, as y adoption by usage, and custom of ttc makes ym a part of y unwritten Law. But still as yr country was originally settled by y English, they brot with ym so much of these Laws as then existed, as their birthright, wh laws formed y basis on wh y superstructure of our code of Laws has been built —

So yt now y C Law of Eng is "prima facie" y Law of Every State in y Union, both quia it was their inheritance and sanctioned by adoption and immemorial usage — and hence our Cts can't reject it no blamely unjust, or inapplicable to y circumstances of our Country, in either of wh cases, it is clear, Cts of America wd not consider it binding

Thus then an entire branch of y C Law, wh from y different form of our government, can't apply to us, in Peace and War Services wh only exist in Monarchical countries, and so of those precedents, y binding force of wh, has been much lamented by y Eng Judges, on account of their Injustice —

Every Country must have an unwritten Law, without wh there wd be a failure of Justice —
A Ct of Justice can't administer Justice in one single case,

without it, or they must either adopt or reenact "pro re nata".

A question formerly arose, as it was possible conversably with y union, yt any State ed have a C Law of its own, distinct from yt (y C L) of England? This question has been so long and in so many of y States affirmatively settled, yt it is now mere speculative theory.

I have no doubt, but yt each St & might have a Com Law distinct in some respects, and y only plausible objection to ys demonstrable proposition, yt they even cant have a custom old enough — to be legally a Custom and if we trace to y end of time, we cant have kata y Eng arbitrary Rule — But that a Custom must go back to Richard's. 1st is a rule entirely inapplicable to our circumstances, as we were then, not in existence —

The crush — y objection lies in "a crisis" for y question is, can we have a C Law in any respect different? Objection eq s. No — quia if we ed it no be different from y C Law — as it wd not be sanctioned by age — That is no more, yn saying — We cant, — quia we cant. But y question is settled by every State, having some sanction or rule on ys subject from y C Law of England —

III. The second branch of y municipal Law, is y "written Law, or "Lex Scripta" consisting of Sts. 1t acts of Legislature —
1. Bl 88. 1. Co 20. It has been made a question, how far y Eng Sts are binding in ys country — Tis pretty generally agreed yt y ancient Eng Sts are binding here on y same principle of y C Law — of England — 1t. prima facie — and y reason assigned in y Eng Books, why any of their Sts are binding on us, is, yt our Ancestors brot
Pow D. 32. over with ym, on y colonization of ys country, as much of ys
1. Tuck Bl Parent Law as was in Existence at yt time — They consider
38 1. 84 ym as their birthright, as did y Eng Jurists with respect
Salk 411 to all their colonies —
666
2. P Wms 75. In analogy to ys distinction, professional men have

determined, or not passed before our revolution or at least before our colonization, are binding, but passed since our colonization, are not "Prima Facie" obligatory on us. The time of decision is read in y Reign of Eliz 8th - y latter of wh reign are not even "Prima Facie" Law in yd country - The whole Law of Entails is derived from y St "De Donis" All actions wh sound in Case are derived from Westm 2d - The St De Donis giving an action to Executors & administrators, in y case of a Tort, is adopted in most of y States -

With respect to C Law, a distinction between Ancient and Modern would be a Solecism - A Modern decision in derogation of y Ancient rules of y Supposed C Law, don't make a new law - but only declares, what y C Law originally was -

If y year books are prima facie Evi of y C Law of yd country, y reports of y decisions of Ld Mansfield and Kenyon are equally so, for they have only declared what y C Law immemorially has been, or in other words made y application of an old principle to a new set of facts - But y distinction between Ancient and Modern Sts are perfectly intelligible -

When I speak of Ancient Sts being binding, I don't mean yt yy are binding upon our Legislatures, they doubtless can alter and retrench ym as they please, but I mean yt our Cts are prima facie bound by ym - Where to sum up y whole, y Ancient St Law, in so far as our Legislatures have altered it, is Prima Facie our Law - But those Sts wh have been enacted since our "colonization", and unquestionably since our "revolution" are not so even Prima Facie -

In some of y States y body of y Eng Sts, have been incorporated down to a certain period by y legislatures, as in Ill and Indiana,

Different Kinds of Statutes—

All Sts are either Public or Private. 1E. General or Special—
1. Bl 85.6 A Public St is one wh regards y whole community at Large—
A Private St, is one wh regards particular persons, and
private customs— The application of y s distinction aint always
obvious— Tho' apparently plain— Most Public Sts regards
y concerns of y whole State literally, as y St of limitations—
of Frauds and of Usury—

So when a Statute enacts no person shall do so, it
is public— So Sts prohibiting certain acts and inflicting certain
penalties upon whomsoever offends vs y m, are plainly
Public— In these cases, y distinction is satis obvious, y St
being unlimited— But there are cases of Sts regarding only
a particular class of men only, are Public, tho' y relation of
be immediate— The rule of distinction Laid down by Lo Coke
is, if y class of Persons to whom y Sts relate, amount to
a Genus, y St is then Public, but if y Class be only a
Species, y St is Private "Generale dicitur a genere, et
Speciale a Specie"

If y class to whom, y St immediately relates, be divisible into
Species, or other classes, it is a Public Stat, but if y class
is divisible only into individuals, it is Private, If then a St
be divisible into parts, one of wh applies to a class, and y
other to a Species, one part is Private, and y other Public—

Acts are deemed to be Public acts, wh y Judges will
take notice of, without being pleaded, those wh y Judges
will not take notice of without pleading, are Private Sts—
A St wh relates to all y ~~Sts~~ Subjects in y Realm, is a public one,
Altho y words of it are particular— Yet if y intent is
General, y St is a public one and vice versa—

Q 2
B 2
Qual!

R. v. Ld. Ashley

A St relating to all mechanics is Public, because they constitute a Genus; but relating to all Blacksmiths, is private because they are one of y Species, wh constitute y Genus of Mechanicks.

So a St relating to all officers capable of serving Legal Process is Public, but one relating to all Sheriffs, is private, for in all these cases, y species ain't composed of subordinate classes, but only resolvable into Individuals, and a St relating to an Individual or any number of Individuals, by whatever name they may be called, is a Private Statute — But a St authorizing all Guardians to sell y land of all Minors, wd be Public — 1. Bl. C. 86. 4. Co 76. a. b. 2. Saund. 154. 1. Leven. 86. Ld Raym. 120. 381.

Every St wh regards y King, is a Public St, for every subject has an interest in y King, For y same reason every St relating to y President of y U S, or y State Government, is a Public St, tho relating to one man, because it relates to him in his official capacity — Hobert 27. 4 Co. 77. 8. Do. 28. 138. Bac Ab. Title St S.

Hence a St giving a forfeiture or Penalty to y King or State is public, because of y forfeiture y all Sts concerning y Revenue are Public, for yo concerns y Public — Bac Ab Stat S. 12. Mod 243. 613. 10. Co 57. Plow. 65.

A St may be partly Private and Partly Public. — Bac. Stat S.

It ain't unusual for y Legislature to declare a St public, wn its nature private and by y principles of y C Law private — They doubtless have y power, and for y sake of y convenience, often exercise it, as it prevents y necessity of counting upon and reciting y St, whenever action is brot upon it — For a private St must be specially pleaded and proved as matter of fact, whereas y Ct is bound "ex officio" to take notice of a public St, wthout its being pleaded —

2. another division of Sts is, yt all Sts are either declaratory of y C Law or remedial of defects therein — 1. Bl 86. Sl Cond. Declaratory

A declaratory act merely declares, what y C Law is, and always has been — and makes no new Law — Post 22 —

Remedial. But a remedial St introduces a new Law, either by avoiding y superfluities or by supplying y defectiveness of y C Law as y St of Limitations and Frauds -

Explanatory. To yse may be added a distinct class of Sts, not taken notice by any of y Books, being distinct from both of y former, and are called explanatory Sts; as 34th Hen 8th - and wh explain a former Stat, and wh are neither declaratory of y C Law nor remedial of such, but form a distinct class - There are however but few such, most Stats with y exception of Penal Sts, being Remedial - Bac Ab. St P. 6 -

1. Rol. R 142. 140 - Salk 264. Carth 386 -

Thirdly. Thirdly - Another coordinate division is yt of Penal and beneficial Sts. or Penal and not Penal - This last is also sometimes called remedial - Beneficial is here used by Ld Coke, as contradistinguished from Penal, and I think properly as there will then be no confusion, "Remedial, being ante used as opposed to "Declaratory"

Bac. Ab. St P. 6 - Cro J. 414. 415 -

A Stat inflicting a penalty or a punishmt of any kind, is a Penal St - a St not inflicting such is a remedial Stat -

Cro J. 414.

I wd here observe y word penalty in its most comprehensive sense, is synonimous with punishmt, but in its narrower sense, or in common parlance, it means a forfeiture or Pecuniary penalty -

- 15 - Salk. 212. Cro J. 414. 1. Wils 125.

A Stat then giving higher damages yn are required by y rules of Natural Justice, wd seem to be penal, but they are not so treated in y books, but as Remedial - as Comyn D. a. 1. action on Stat. 1. Wils 126 & 7. R. 259 - Ba Ab St P. 6.

Salk 269 - Carth 119. 22. Comberbach 100 - 4 Mod. 7 - Salk 205.

All sts giving costs, are considered as Penal and so construed - for they are unknown to y C Law and y St wh created ym (y first of wh was Gloucester 6. Edw. 1) so considered ym. Moreover they are given as a substitute for y old C Law amercement, wh tho nominally used in Judgmts, is substantially abolished -

Bac Ab St P. 9 - Bac. Abr. Title Costs. P. 9 - 511 -

When y Pltf pays costs, it proceeds on supposition, yt he made a false claim and where y Def pays, yt he withheld from y Pltf his right – The old amercement was a Penalty – 16.

An action brot by an individual in his own right to recover a Penalty, is a civil action, tho' y St on wh it is brot, be a Penal one – Thus y St of Eliz gives £10 – to y Prosecutor for Perjury – an action to recover y sum, is civil, so of y St of Uses, and Qui Tam actions upon it. Post 46 – Cowp 382. 391 – 1. Mils 125. 7 Mo. 257. 4 Bro. 753 –

What determines y character of y action, is y form of y Process. If it commence by writ or declaration, it is civil – but if by indictment or information, by wh y process is a Capias, it is Criminal and yo is of great practical importance, as it regards y rule of Evi and amendmt.

Civil actions are Transitory, but Criminal Local –

Fourth All Sts are affirmative or negative, yo must be determined by y phraseology, and practically is of no importance, any more yn to say, all Stat, all Sts are in red ink or black ink – Fourth

Bac ab Stat. G. 1 Bl. 89 –

All actions between party and party are civil, tho' for y recovery of a Penalty, it is as much so, as an action for money had and received. Ibid –

In Eng every St commences its operation from y commencemt. of y Session of y Legislature, in wh it is enacted, ni some other time is prescribed for its commencemt by y act itself – This arises out of y Legal Fiction, yt y Session continues but one day – as a St of Justice Ld Ray 371. 1. Sel 310. Bac ab S. 3. Bl 309. 222 – 1st. first day

But y Law most often operates retroactively –

It has been holden, yt Two Sts, enacted in y same session, and inconsistent with each other, will both be repealed with respect to y repugnancy, but there is no later decision, wh is, yt y latter in point of time, will repeal y former "bro lands" and yo I take to be y better opinion – Bac ab St B. C.

6. Mod 287

Put

This last rule is generally adopted in ye country, and it customary for Congress, to fix a time, when a new Stat: begins its operation –

Before entering upon ye construction of Stats, we shd observe, with regard to ye character of ye Two Grand divisions of Municipal Law – yt ye Stat Law is a mere methodical collection of Positive Rules, too limited to meet ye vast variety of cases of ye municipal Law – On ye Contrary, ye C Law is a Concatenation of Principles founded in Justice, and so extensive as to embrace all ye rights of perfect obligation –

It may be said to be a system of ethics, embracing all ye duties, wh are ye rights of perfect obligation –

Hence arises ye vast superiority of ye C Law, so highly deserving and surpassing all ye Panegyric, yt has been, or can be pronounced in its favour –

The Construction of Statutes – is ye process by wh we discover ye will or intention of ye Legislature –

In ye construction of Sts (especially remedial Sts) there are three points principally to be considered. First, what ye old Law was at ye Enactment – Second, the mischief or evil yt. what ye old Law didnt provide for – Third, ye remedy applied to prevent ye mischief, hence ye Construction must always suppress ye mischief and advance ye remedy –

3 Co. 7. B – 1. Bl. 87 –

The object of ye rule is, then, to ascertain from ye old Law ye mischief for wh ye remedy is intended to provide –

Thus by St. 13 of Eliz, leases made by bishops, for more yn 21. yrs are void – To find out ye meaning of ye St or indeed of any other yt is doubtful, a logical mind is led spontaneously to enquire, what was ye old Law – It ~~ma~~ enabled Bishops to make leases for an indefinite period of time – Then what was ye mischief in ye – The impoverishment of their Successors – (such leases have been adjudged good, during ye continuance of ye bishops in his See) and merely voidable on his death or removal. The Remedy is intended to prevent ye impoverishm by long Leases – Post 21 – 22 –

The two first are merely important as means of construction, for wd y remedy is ascertained, y Law is ascertained — Stat. Law is y will of y Legislature in Writing — Com Law. is Stat worn out by time —

The rules of minute interpretation laid down in Bl. apply as well to St as to C Law — 1. Bl. 59. 61 — Bac Ab. P. 4 —

Penal Statutes — must be construed strictly and rather than literal import, and so rigidly has yd rule for prohibiting y construction of Penal Sts, been observed, yt it has sometimes been carried to a ridiculous extent — The St 1. Edw. 6th takes away y benefit of Clergy, from a man convicted of stealing horses. Stealing a "horse" was adjudged not within y St. So stealing a "Buck" was adjudged not within y St making dog stealing felony — This is merely from y benignity of y Law wh prevents y accused, from being banished when not within y Letter — The true meaning of y Rule then is, yt as y Party accused, Penal Sts are to be construed strictly, but when for him equitably and liberally. Ie. y person accused is not to be adjudged guilty of y Penalty, when within y reason and spirit of y Law — nd also clearly within y Letter — 19 — 6 Mod 55. y extending 1. Bl. 88 — 3 Co. 7. 8 — Leach C. Law 107 — Bac Ab. P. 8. 4. Bl. 133 — 4. Bl. 3. — Leach Crown Law. 170. 295. Do 233. 310. 87. 4. Bl. 133 — Bac. St. P. 6. P. 9. Row. 17. [Hawkins P. Sta. 61. 53 — 131. 138. 9.]

But tho the is strictly within y letter, he is not to be adjudged within y reason and y spirit — Hence y Tiend may be remedied & take a thing out of y St, who is within y letter, but not being within y Penalty, a person who ant within y letter — If he ant within y letter, he ant within y Penalty, Hawkins. 61. 53 — 131. 138. 39

Hence if a St enacts, yt whosoever does "so and so" shall be guilty of Felony, here it is clear, yt Infants, Idiots ant Lunatics, nd not be convicted, for tho within y letter, they ant within y Spirit —

To gen any universality of expression, in a Penal St, wd not include those, "wn they are specially named) who, by reason of any legal incapacity at C Law are exempt from such punishmt, for any act, not before forbidden by y C Law 1. Hawkins Ch. 64 — 635 —

for wh^en, it provides a Corporal punishmt, it doth extend to Infants, nr expressly named, as whoever erects a Nuisance, on a highway &c, shall be whipped — Infants ant within it, nr named in words expressly —

Contra. Ld Hanion who thinks it an arbitrary distinction. —

It ant however to be understood, yt y intention of y Legislature is to be disregarded in y construction of Penal Sts, as y Party accused: to make any distinction seems vs y nature of things. The truth is, y intention of y Legislature when apparent, ought always to govern, and ys wd not be a sanguinary construction, as some have stated, but a just and legal interpretation. 4 J. C. 3 — where Ld Hanion strongly animadverts on ys practice — and Plow. 8. 6 — 86 —

21. This rule of strict construction has not however been uniformly acquiesced in —, for there are cs in wh y Eng Cts have gone so far, as to bring a person (not within y letter) within y Spirit, as in y case of a Servant who was made guilty of Petit Treason, for killing y Master's wife, when y St only made it Petit Treason for killing y Master and on y ground, yt y will of y Legislature, wh is y Law, wd Seems be evaded — (Gould Contra)

In conformity to ys rule of strict construction, it has been
1. Hale 168. settled, yt if y repetition of an offence, is to be aggravated
1. Hale P. C. 170 punishmt, for y 2d offence, ant guilty nr he has before y commission of y Second offence, been tried legally and convicted of y first — for there is seldom no Legal process, i.e. no record of Judgmt vs him, wh is y only proof in ys case. —

Bac Ab St P. G. — 2. Bulstrode 349 —

1. Root 52. Note In ys case, y accused must be convicted of y first,
Pea Rp. 57. even before y second is committed, or he will not be subjected to y increased punishmt. This is a strong instance of y benign construction of Penal Stats —
The first punishmt, says y Judge, was intended as a

salutary discipline, and ye offender ought not to incur ye augmented punishment, till he has reaped ye benefit of ye first Lesson —.

He may be indicted for several offences in ye same indictment or presentment —
It has been holden in ye Cts of Exchequer, yt where, same penalty has been repeatedly incurred, by a continuance of ye Fence — as for a Nuisance, neglect to erect a mill &c, only one penalty can be sued for and recovered at ye same time, The Cts proceeding upon ye ground, yt ye punishment for ye first offence being a warning to abstain from a repetition, he shd have suffered ye whole of it, yt, before he cd be presented or prosecuted for ye others —
Judge Gould Contra and it is extremely opposed to ye Eng Rule —
There are some cases, in wh Penal Sts have been extended by construction, but they are clearly departures from Law —

The Penal Laws of every Sovereign State, are strictly local, whereas "Remedial Laws" are transitory — so yt ye Penal Laws of one country, can never be enforced or noticed in another, so as to affect ye rights of Citizens in ye latter, "A Nation can't punish faults committed out of its Territories" — yo is a principle of Public Law, for there is no such thing as a community of Criminal Jurisdiction in Seperate States —

The Penal Laws of every country extend to all aliens, while within yt country, and if they commit crimes there, they must be tried by ye Laws, for they owe a temporary allegiance to them, as long as they reside within their Jurisdiction — 1. JCB. 123. 3. JR. 733 —
Henning 38 — Rattel B. 1. Ch. 19. Sec 232.
As a man can't be punished corporally for an offence, attended with yt punishment in one State) ~~as another~~ in a different State, from yt wherein ye offence was committed, so neither can he be punished for any other offence —

But one may enforce any right, strictly civil and not in its nature local, as well in one State as another, regardless where y cause of action may have arisen, Thus if A give B a bond in Connt, it may be recovered as well in Pensylvania, or London as in Connt, and so of Slander and even Battery, so far as regards y civil remedy and indeed every other civil cause of action, wh is in its nature, transitory.

It has however been determined in Connt, and Massachusetts, yt if goods be stolen in one State, and transported by y Thief into another, he may be tried and punished in y latter, upon y principle, yt he repeats y Theft in every stage of his progress. This decision is in 1. Mass Tr. 116. is to say y least a very extraordinary one.

This point however has been settled y other way in N Y. and by Judge Patterson in y U S Ct, in y case of y U S. vs Page. in 2 John 477-9. It was decided yt a person apprehended in y State of N Y. in possession of a Chaise, horse wh he had stolen in Vermont, ought not be convicted in N York. This was y case of y People vs Gardner. and these authorities I conceive, to be demonstrable of y Law. This I conceive right.

2. John R. 477 79.

It has been opposed on y principle in y Eng practice, yt where a felony has been committed into different Counties, it may be tried and punished in either But y analogy can't be extended to 2 different or Seperate Governments, governed by different Laws, and under different heads, like any two of y U S. S or in y different Counties of Eng. y same punishments are inflicted under y same Supreme Jurisdiction.

Further it is impossible for a Ct to know Judicially. an in what we call a Theft, is an offence at all in a neighbouring State. The man might have come honestly by y goods and bringing ym into a State, is certainly no offence of itself.

turn over 10 leaves. at No 2

Moreover what we call Larceny might in some places, as it was in Sparta, under certain circumstances, be no Offence — and what is still worse, a trial, and acquital, or Conviction in one State is no bar to an Indictment in another

Remedial or Beneficial Sts are to be construed liberally or equitably to effect y intention of y Legislature. Ps Cs not within y letter have been adjudged within y Spirit and vice versa — For yo rule operates both ways — As St 9th Edw 3d gives a remedy vs. Executors in certain cases, but says not a word of Administrators, here y Ct has enlarged y Stat, and decided yt Administrators — are liable, when Exors nd be — So on y other hand y Spirit may restrain y letter — thus St 32. Hen 8th enacts, yt "all persons, may devise lands," y Cts have decided yo y words "all persons," didn't include Idiots, Feme Coverts, Infants &c, and y explanatory St 34. Hen 8th sanctioned their decisions

3. Co 7. 1. Do 123 - 11. Do - 71. 3. Bl. 430-31 - Pow. Ds 140-41 Bac. Ab St. P. 6. 7.

Dyer. 334. 1. Bes 300 Pow. Dev. 141 - Bac Ab St P. 6.

Under yo Gen Rule, clauses, sentences, single words" and even a legal Technicals, are sometimes construed by Cts, when used in a St in a sense different, from what they usually express. This may be illustrated by a whole class of Cs, arising under y words "void & voidable" a distinction of Primary Importance, as no two words of y Law have caused a greater latitude of discussion — Ante 10. 14 —

"void" is a mere nullity, can't be ratified, and is, as if it never had been, and 3d persons may take advantage of it — "Voidable" stands good till avoided, and no one can take advantage of it, ni y Parties or their representatives — The true distinction is, if an act or transaction is declared "void" by Stat, it is holden to be strictly void, if y mischief intended to be prevented wd be let in by construing y act as only "voidable" but on y contrary if y mischief wd not be let in by construing y word "void" as voidable, it may be and often is so construed — To Exemplify yo distinction, y St 27. Eliz, (to wh there is a similar one in most of y States) provides "yt all conveyance by debtors to

1. Bl. 87 - 3. Co 58. B. 60 - Co Eliz 141. 207. 10. Co 53 - a 2. PR 606. 7. Do 310 - 2. SR 413 -

to defraud bonafide creditors, shall be absolutely "void" Here y construction must be literally and strictly so, or y Stat is a dead or y Stat is a dead letter, or y only possible way in wh y end of y Stat, can be answered, is, to treat y conveyance as if it had never been— Were it construed as only voidable, y mischief wd be let in, and farther, as moreover third persons cd never take advantage of it, (I speake of Ex Creditors) Page 18.

Terms merely permissive in Stat Law— when construed as mandatory, and it is a fin Rule, when y St enables a Ct to to a matter of Justice between y Parties, they are bound to do it in all cases falling within y St, and y enabling words have an imperative effect, thus y 6th and 8th Mill and May— enacts, yt Cts may award costs, to y Def in certain criminal cs, In such case, y Cts are bound to do so— wd "may" means "must"

2. St 1131— 5 T.R. 588— 2. Shawh 263— Bac. Abr. S. 1—

Where a St directs y doing of a thing, for y sake of Justice, or y Public good, y word "may" is positive— But yt Rule don't extend to executive officers generally— in relation to y official acts, wh a St enables ym to do—

You Mr Hare of Pensylvania made y correct distinction— The constitution of yt St enacts, yt y Governor, or y Representatives of both houses of y legislature, requesting— may remove y whole bench of Judges, or any one of ym— When thus addressed, he refused, the legislature endeavoured to convince him, yt y word "may" in y act, meant "must" but his answer was, yt it meant "want" when addressed to a Governour—

However a St tho "beneficial" taking away a Cm Law remedy is construed strictly for such abridges y Cm Law— rights of Citizens or subjects, Thus it has been holden at Cm Law, yt y action of Trover when concurrent with Trespass is not barred by y St—

10. Mod 282— Bac Abr St S 6—

There is however one class of Sts, falling within ye last distinction, wh are construed liberally. viz ye Sts of Limitation, wh, tho' they take away ye C Law remedy, are not so much for taking away ye right of one party, as for quieting ye long disturbed possession of another, and ergo properly called Sts of Repose – Ecclmt 58 – Salth 421 – 4 Mc. 308 – Runnington 58.

Words of an explanatory St can never be extended by construction, they must be taken in their strict sense, for ye office of an explanatory St is, to give ye meaning of ye Rule, and is in itself an act of construction, seeing ye terms might be indefinitely extended. Carth 386 – Salth 534 – Bac Ab St. 6

In Sts yt are partly Penal and partly remedial, ye two rules of construction have their respective applications. Thus in ye St of Fraudulent Conveyances, wh has a double aspect, one part is, to set aside ye fraudulent act, and thus far "remedial" wh wd receive a liberal construction, but ye part wh inflicts ye penalty, is Penal and must be construed strictly as must all Sts acting vs ye offender – 1. Bl. 58 – Plow 57. – Bac Ab St. 6. – 3. Co 82 –

The different parts of a St are always to be construed, yt ye whole may, if possible, take some effect, (same in Contracts) Hence it is always objectionable, yt any part is rendered nugatory to wh it is possible to give an effect, as if one construction wd make a word nugatory, and another give effect to it –

But where words are synonimous, either construction may be made, in repugnant to ye body of ye Stat – For repugnancies are if possible, to be reconciled and if irreconcileable, ye latter part reveals ye intent, "protanti" and a Saving yt annihilates ye whole body of ye Stat, is utterly void, a Ct will never suffer a part to destroy ye whole, or charge ye Legislature with such an absurdity, but ye purview of a St may be qualified or restrained by a Saving – 1. Co 47 – 1. Bl. 89 –

But if a Proviso in y St, is contrary to y business of y St. y provisi is good and not y purview, quia such speaks y latter intention — of y Legislature —

The rules of construction of Sts are y same in Equity as at Law — Tis a very erroneous idea, yt Equity will give a construction contrary to a St of Law — or rather different — True they may differ in construction as well as two Sts of Law, Two Sts of Law may, but y principles may and must be y same in both — for y legislature can't mean different in Equity and in Law — The remedy may differ, y proceedings always differ but y construction of Sts and Contracts, is y same in Both —

1. Sanb 22.
3 Bl. 431. 433.

A St contrary to Natural Equity is void — "Pura naturæ sunt immortalia" "immutabilia"

Repeal of Laws

All Law an Com or Stat is repealable — and ys must necessarily be y case, for y power of making a Law, necessarily involves yt of repealing it — But y Legislatures of y Several States, can't repeal any constitutional provision — Whenever y Comon and Stat Law differ, y Comon Law is abrogated or repealed by Such, wh is y latter intention of y legislature, and not upon y ground of its being of higher authority, as erroneously supposed, and a St is of course always considered of later date, yn y unwritten Law —

Co Litt 111. 115.
Bac. St. D. 8.
6. Mod 287.
1. Bl. 89 —

So if 2. Stats differ, y elder is repealed, and ~~stt~~ still further if two parts of y same St. are repugnant, y latter part, shall stand alone, and repeal y former — or other "pro tanto"

11. Co 63. Bac Ab St D.

Bac Ab St D.
1. Bl. 90 —

And as every St is repealible, a clause in any St, yt it shall not be repealed, is void So an act enacting yt it shall be repealed only by a majority of Two Thirds — or Two Sixths — is void, for a majority can always repeal a former Statute. Moreover such clauses are in derogation

of ye authority of a future Parliament — and a prior legislature can't bind a subsequent one, nr by compacts wh are not properly legislative acts, but conventional. Hence it is, a General rule, yt all acts in derogation of ye power of a subsequent Legislature, are void — This principle may be brt to bear on some of ye constitutions of these States, wh a majority have at all times, a right to alter. indeed ye ~~est~~ statement of ye proposition carries with it conviction, and is self evident, for they can alter any legislative proposition by a bare majority of one vote —

But ye constitution of ye U S, is a compact between distinct Sovereign States, and is a matter of convention attainable only in ye manner prescribed —

The Law never favours ye repeal of a former Law by implication, Where 2 Sts are apparently at variance, Cts of Justice are so to construe ye m, yt both may stand, if possible. and ye repugnancy must be clear, to repeal a former Stat — for it is to be presumed, yt if ye Legislature intended to repeal ye former. yy wd have expressed yt intention — 11. Co 63. Bac Ab St 3.

It is laid down in ye books, yt an affirmative Stat does not repeal ye C Law — Bac Ab. Tc. G. C Litt 111.15. 24

This is not satisfactory by any means and verbally unmeaning, for a Stat couched in affirmative terms, may or may not repeal ye C Law; if it is inconsistent with it, it repeals it, secus it don't — This opinion is corroborated by many Cs, in wh it is confessedly repealed — The same may be said of negative Sts, Com. D. Tc. 1. Bl. 189.

The above has arisen out of yt decision of Sts abovementioned, wh to say ye least of it, is senseless —

When it gives a remedy in any case, ~~so~~ in wh there was a subsisting remedy at C. Law, and don't abrogate ye C Law —

2. Burr 803-05 Com D. ac. Sc. E. expressly or impliedly, there will be two concurrent remedies, y St being called "cumulative"

If a St inflict a higher or lower penalty or punishmt
4. Burr 2000- Sewch Ch 252- Bu Ab St St. yn is inflicted by an Elder Stat, y elder is of course repealed, for it ant to be presumed yt y Legislature cd provide two distinct Stat punishmts for y same offence-

If a Penal Stat inflicts a lower ~~F~~ punishmt, yn is inflicted by
10. Mod 33; Bac Ab. ii K. y C Law - for a given offence, y C Law is repealed by y Stat, and y lower punishmt can only be inflicted,
4. Burr 2026- 4 Ab. 138- for clearly where y legislature lessen a penalty, they mean to repeal a higher one-

But if a Stat inflict a higher punishmt yn y C Law, for y same offence, y C Law ant abrogated, y St punishmt being only accumulative, and y offence may be punished under either - The St 5 of Eliz furnishes an Example of yo, wh punishes perjury more severely yn y C Law, and yet y prosecution may affect either - But it has been asked, is there not as high Evi to repeal y old Law in y last case as in y other? I confess I think, there is, and y distinction is founded altogether on y benignity with wh Penal Sts are construed -

~~But then~~, observe then, y marked difference between a St inflicting a higher and a Lower penalty, yn was done by a former Stat, or by y C Law
An higher or Lower, y former Stat is repealed, but at C Law, there is a difference, so yt if y Stat penalty is lower yn yt at C Law - it repeals it, if higher, it ant repealed -

25. It is laid down in some of y books yt an affirmative Stat

doth ~~apeal~~ repeal a Prior affirmative Stat; This is incontestible, and to me appears, an arbitrary and unmeaning distinction, wh I have never seen satisfactorily explained. 1. Bl 88
An explanation is attempted in 2 Show 30, wh only confounds confusion

. . . . . .

The true criterion an one repeals y other, or not, is, an y latter is inconsistent with y former, for if it be inconsistent with it, y latter repeals y former, tho' both are affirmative.

But these rules, relating to repeals, founded in repugnancy, apply only to constructive repeals, and not to express clauses, for where there is an Express repealing clause, 1. Bl. 90
there can be no question, When y repealing St is itself Bac. Ab
repealed, y original Stat is "ipso facto" revived. S. D.
On y other hand, if y St, wh has been repealed, is revived, y repealing is void, so far as is repugnant to y first "pro tanto"

The repealing Stat becomes void by y reestablishment of y repealed Stat; by implication, for in ~~ot~~ either case y intention of y Legislature is evinced.

2 B.

If one Stat is grafted on another, for y latter execution of y former, y repeal of y former, virtually repeals y others. So, if a St be revived, y explanatory acts attendant upon it are revived with it, and all Sts "para materia" are to be taken together, as if founded on one Law.
So where an an action founded on a former Stat, is given in a new case, every thing annexed to y action is also given.

When one St is expressly repealed by another, wh makes a different provision on y same subject, and a provision for its own continuation for a limited time, y former St doth revive after y lapse of yt time, in it was specially provided for, by y latter, 3. East 205. for y express clause

shows, yt y repeal was not intended to be limited to y duration of y other provisions.

Bac. Ab. S.2. Where a St has been repealed by 3. or any number of repealing Stat, and only 2. of y repealing Stat are repealed y 3d continues in force, and repeals y original Stat.

Ibid If a Stat, yt has been repealed, is revived, y repealing act if merely a repealing one, becomes void "in toto" but if more, it is only void, "pro tanto" for it is impossible, yt y repealing clause shd remain in force. When a Stat is repealed, all acts done under it, before y repeal, are good and lawful, for y repealing of Laws only makes ym cease from y time of y Repeal. But it is laid down in some of y Eng Books, yt if a Stat is declared to be void, all acts made under it, are absolutely void and null.

Anken 233.

This ant admissible, and won't bear a moments scrutiny. It is too destructive of y peace and policy of y State, to be tolerated, Indeed it wd be punishing our obedience to y Laws.

Tis a general rule, yt a Stat can't, nor ought not to have a retroactive "operation" and indeed such is forbidden by y rules of y Municipal Law, for y rule wh forms a Law, is to be prescribed.

Hence if a Genal Stat after having been violated, and before judgmt is given vs y offender, is repealed, and a new Stat is made on y same subject, y offence ant punishable under either, ni y former is expressly ~~repealed~~ continued in force, as to all acts and offences committed before it was repealed by an express clause to yt purpose. For y offender can't be sentenced under y first, for by y supposition, there is no such Law in Esse, nor can y latter Stat affect him, for if it did, not being in existence at y time y offence was committed, it wd operate "Expost facto" wh is forbidden by y Constitution of y U States.

1. Bl. R 451.
1. Hawkins 66.
Bac. Ab St. B.

There was a case in N York, where a Clerk, in y Post office, was indicted for repeatedly robbing y mail, but boot y indictmt and befor y Trial, there was a law passed, altering it, as it stood at y time y offence was committed, and he ergo escaped punishmt entirely — R S vs Treadwell.

This rule is founded on y broad principles of Criminal Law. Hence it has become common to insert in repealing Stats, yt y repealed Stat shall continue in force, as to all acts, committed before y new one was enacted.

But a Stat thd not wrontally retroactive, in its provisions, may become so indirectly and its retroactive cant be prevented, as if a contract is made to do an act, lawful at y time, but wh before y time of performance becomes unlawful by Stat, y contract is annulled, for y Covenantor can never be compelled, to do an an unlawful act, and yr is perfectly consistent with y retroactive prohibition. Thus if a contract shd be made to import certain commodities, and before y time of importation arrives, an embargo, or a non importation act, or a declaration of war, shd render y performance unlawful, y contract wd be annulled, it amts to y same as an inevitable accident — (Contracts 50-51-140)

1. Salk 198.
Pow C 44. 46
La Raym 317. 321. 1362.
8. Mod 51. 374-
2. Finny 218.
1. Ld 211-

But here it is to be observed, yt y Stat in terms is prospective as to a future illegal act, to y rule is not, yt y Parties shall not be bound by y performance, when y act was lawful, but yt performance cant be compelled,

In y other hand, if one contract not to do a certain, wh a subsequent Stat makes it his duty to do, y contract is annulled, as if one shd contract to serve another and not depart without his permission, and he is ordered into y army — here y Law annuls y contract and every contract must be made subject to ys tacit condition.

Salk 198-

If however one covenants to do an unlawful act, a subsequnt St making y act lawful, don't annul y contract, for there is no inconsistency in obeying both - Ibid -
If a contract illegal by Stat, is made while y Stat is in force, a subsequnt repeal of y Stat, can't give validity to such prior contracts, nor can it be made good.

28. Instances of ys kind occur under y "Stamp act" making all contracts wtht Stamps void, tho' ys was repealed 1810, yet all made wtht Stamps, while y act was in force, were as much void after y repeal, as before, for we are to look at y State of y circumstances, when y contract is or was made - 1. Pe Pb. 65 -

If complete performance of a lawful agreamt be made illegal, by a subsequnt Stat, yet if it can be performed in part legally - a performance of y part will be enforced in Equity - and I trust in a Ct of Law - if yt Ct adapt a remedy to y case, - Thus where a Dean and Chapter covenanted to make a lease for 90 yrs, and before y lease was made, leases by Stat were made void for a longer Term, yn 40 yrs - These y Contract obliged ym to make a lease for 40 yrs -

Plow 284
2. H Bl 581 - 163 -
1. Sim 249 - 215
3. Pow. Pc 383 -
2. Pe 254
2. Pow C. 31 -
1. D. 448 -

Sitle Contracts 52 -
Powers of Chy 52 - 51.

This is sometimes called performance Cy pres "Cy pres" "as near as may be"

So also if a complete or literal performance is prevented by act of God, y rule is y same, and performance may be compelled cy pres. Thus if a man covenants to convey a house and lot, and y house is burned by lightning, he may be compelled to convey y lot but y other party ant bound to accept it -

Art. 1. et 10. Const of Ut. S. & U. S, forbids y States legislating making any law, impairing y obligation of contract, IE. "ex post facto Laws" now it has been a question, in a

a Stat making a contract void, conflicts with ye Section of ye constitution - I apprehend, ye articles has no bearing on such, or if a contract to do an act, afterwards made unlawful, were not annulled, ye consequence wd be yt individuals by contracting with foreigners, might curtail ye powers of ye Legislature. Moreover, I conceive, ye Section applies to those acts, wh directly make void contracts between individuals, and not those whose annulling prohibitory effect is merely consequential, and yt an act of ye nature, whose object is ye public good, is to be void merely, quia an individual may suffer, is absurd -

That part of ye constitution relative to "ex post facto" laws, has no concern with ye, for they are Penal retroactive laws, under ye head. it may be observed, yt Insolvent Laws under our State Legislatures, may be made so far as to discharge ye person of ye Debtor, but any provisions discharging his future acquisitions, or property, is void - This was determined in ye Supreme Ct of ye State - 4 Mcalvin 122.209. 6.20 131.

It is laid down yt a Stat requiring yt to be done, wh is impossible, is void - 1. Bl 91 - So also it has been said by Ld Coke, Holt and Even Bl, yt a St contrary to reason or divine Law is void - But ye I apprehend, is indefensible, as there is nothing about wh men more widely differ, yn in these opinions of ye divine Law - Yt is now exploded. -2 9- Holt 87-9- 8. Co 118-

If a legislature chose to make an unreasonable Law, no Judge can set up his judgmt and overrule such - But I wd lay down ye rule. Mans, "If ye collateral consequences are demonstrably unjust, ye Ct may avoid ym, if they can, by giving a reasonable construction to ye Rule, but if ye intention is plain, they must so administer or leave ye bench - 1. Bl 41. 9. 1. Pinkt 23-

An a St opposed to ye Const. of ye Land was void, or cd be so declared by Cts of Justice, tho' questioned for some time, (wh is a matte[illegible] surprising) is not a difficult Question -

There is no doubt, but yt y Laws are void, and Cts of Justice must so decide, for if y Judge whose duty it is, to enforce and expound y Laws, can't decide as to their constitutionality, y constitution is a dead letter.

The constitution is a part of y Municipal Law of y Land, and paramount to all legislative provisions, and as Cts may declare a later St to repeal a former one, repugnant, or void, so yy may declare a Stat void wh is repugnant to y constitution. There is no more difficulty in one case, yn in y other. Even a Jury may decide upon it, under y direction of a Ct, This question has been repeatedly argued and decided in y Supreme Ct of y U States, to wh all constitutional questions may be carried. 2. Federalist 78. Cts can decide on y legality of Laws.

It has been questioned, how far a St authorizing a Ct of Jurisdiction, in a particular case, or cases, ousts y Jurisdiction of y ancently established Cts of General Jurisdiction. The answer is, if a Stat make a new Law, concerning an old offence, and appoints particular Cts to execute it, y Jurisdiction of a Ct of general criminal Jurisdiction is not excluded by it. but there is a concurrent Jurisdiction, for y Jurisdiction of a Ct of Gen Jurisdiction can't be ousted by implication. The same may be said of our State Ct in yr county. if a St enacts, yt all particular ancient crimes of a particular nature shall be tried by a newly constituted Ct. This wd not exclude y jurisdiction of y corresponding higher Cts in yr County.

1. P. Anstey 8. 9. 114.
9. Co. 118.
Salk. 364
16. Salk. 1042
1. Mod. 115.

The Stat in these cases says, yt yy shall be tried by a particular Ct, and dont say, yt no other Ct shall try ym.

X

But if a Stat creates a new offence, and establishes a new Jurisdiction for its trial, it not perfectly settled un, y Jurisdiction of a Ct of Gen Jurisdiction is excluded by it or not. The better opinion seems to be, yt it is excluded in y last case, for here there is no ancient Jurisdiction to be ousted by implication. This is confirmed by all y Books.

Cro. S. 524.
1. Chan. Rep. 9.
1 Salkeld 186.
2. Hales Pl. Cr. 5.
Cro. J. 630.

If a Special authority is given by Stat to certain Persons, affecting 31
y property or rights of individuals, yt authority must be strictly
pursued, and must appear on y face of y proceeding, or y
proceedings must be void, and y Party acting under it
a Trespasser — Cowper 26

If a Stat enables a certain body of men not incorporated, 3 P.C. 594
to do certain acts by a Majority, and constitutes a certain 4 Bro. P.C. 10. 6.22
number of ym, a Quorum, a majority of y Quorum, not 3 Mod 13 — Bac. Ab. Sc. 5
amounting to a majority of y whole, will not bind ym 10. Co 30 Hob 211 —
The principle seems to be, yt as those bodies are mere
creations of y Stat, they have no other power yn those
especially given ym — or necessarily incident to ym —
. The rule is now. yt a majority of a quorum ant sats —
This ant applicable to Corporations —

32

Authority of a Private nature confered by Stat on 1. or 2. Sty. 117.
individuals, is Point, and not Several merely, ni otherwise Co Litt 181.
expressed, and upon y death of one it dont survive to y
other — 1. Rool 67 — But if y authority be of a Public nature,
it is Point and Several, so yt on y death of one, y authority
will survive to y other — This contemplates ministerial Ibid
acts only — and not Judicial, ni expressly named —

If a Power of a Public nature is given to Several, y act of
a Majority of y whole number, (all being Present) in y y 1. Bos. et P. 229 —
execution of y Power, is y act of all —, y Majority, however, Co Litt 181. a.
have no power to act severally, but if y others are notified, 2. Burr. 1017 — 1026 —
their act will be binding, secus y wilful absence of one 3 T.R. 592 —
might defeat any measure —

Secus if y authority were private —

These rules dont apply to Bodies Politic, of Corporation, in 2. Atk 212 —
wh a majority of all present, will bind y whole, provided 1. Bos et P. 236 —
there be nothing to it in y Charter of incorporation — y
Meeting being legal, all being duly summoned, y number present

constitute ~~forbidden~~ "pro re nata" ye Corporation — Due if ye meeting is regularly convened, is it Suff —

"Note" ye word "void" is often construed "voidable" — and often taken in its Strict Sense —

It has been said, yt "void" withe more, might be construed voidable — Seeing if ye words "to all intents" were added — yes unit ye Criterion, for void to all intents, has been construed "voidible"

Rule, If ye Stat or ye object of ye Stat wd be defeated by adjudging ye act "voidible" it ℞ must be adjudged void — Seeing it may be adjudged "voidable"

Several Sts relating to ye same Subject, are all to be considered in construing wn one — Plow. 206 — Ld Ray. 1028 — Rules of ye construction of Stats, are ye same in Equity as in Law — ye mode of enforcing ye Law, is different —

Of Pleading Sts or ye mode of prosecuting on ye m —

The books on yes subject, are more confused, yn on any other branch of Pleadings, In some cs. they are irreconcilable — arising in a great degree from looseness, or inaccuracy of Language — and from a promiscuous use of ye "Plurales" "Pleadings" "counting upon" and "reciting a St" — wh are specifically different and totally distinct —

"Phrases" instead of Plurales

Merely Pleading a Stat, consists in nothing more, yn alleging ye facts, wh bring ye Case within it, and for yes purpose ye Stat need not be named or referred to, Thus to plead ye Stat of Limitation, in assumsit — "Def merely says. "non assumsit" infra Sex annos" So to plead ye Stat of frauds, &c. ye Def don't refer to ye Stat, but merely says. there is no note or memorandum in writing. Signed by him — or not his act in writing. for form. 3 Ld Raym 11. 221 — [illegible] — 2. Ch. Plds.

Counting upon a Stat, consists in an express reference to it, by y words, in virtue of y Stat. or in y form and effect of y Stat in such case &c, and he who pleads a Stat, also sometimes counts upon it without being required - for they are distinct acts -

Reciting a Statute, differs from both y former, and consists, (as y name imports) in quoting y Statute, or its Contents, True a St is sometimes pleaded by reciting it, together in connection with y statement of facts, wh bring ym within it, but pleading a Stat don't necessarily imply a reference to it, or recital of it -

It is a General Rule - yt Judges are bound "ex officio" to take notice of a Public Stat, tho' they are not set out in y pleading - for if y facts are satis stated, y Cts taking Judicial notice of y Stat, will apply it to ym if they come within ~~ym~~ it, and if a public Statute be denied, it need not be proved, for y Judges are to know it Judicially But if a private Stat, y Judges are not bound to take notice of it "ex officio" and can know nothing of ym Judicially, ni pleaded and recited, for it is a mere matter of fact, a private monument of right, of wh y Judges are no more presumed to know Judicially, yn of y existence of a deed note or any Specialty, and of course, no advantage can be taken of it - ni specially pleaded - and such may be denied by y Plea - "Nul Tiel Record" in wh case y party must prove it -

Ns. not be recited -

4. Co 76 - Cro Eliz 236 -

1. Bac. 38 - 10 Co 57 - 2. Mod 57 - 2. Rolle 450 -

So to take advantage of a Private Stat, it is necessary at C Law - to plead and recite it and if an action is brot on such, it must be set out in y declaration, It must sued upon as a Specialty, - for if it ain't set out, no cause of action appears in y declaration -

4 Co 76 - Bac. St L 2 -

10 Co 57 - 2. East 351 -

But a public Stat when required, as it sometime is, to be pleaded, when used by way of defence need never be recited, tho' they are sometimes counted upon — Doug. 90. Ld Ray. 382.

Cro Eliz 236 — 1. Roll Abrs Ch. 2. S. (11) + Co 70 — Buc. Ab. St. L. 2. 1.

10 Co 5. 2. East 341 —

The pleading, containing y recital of a Public Stat, is so inappositive, yt Ld Mansfield said yt he wd tie y Pleader down to half a letter in such a case, It unnecessarily increases costs, and lengthens y Record, as y Judges officially notice its provisions — It often said yt a Public Stat may be given in Evi, under y General Issue — but y s language is incorrect — and a legal solecism —

36 — The misrecital of a public Stat (in some of y books) is said to be fatal in many cases, and even after verdict, tho' it need not be recited — . Cro. E 245. 236. Comp. 474. Bac L. S. St.

By some it is said yt a misrecital, in an immaterial part, is cured by verdict — Cro Ch 136. 374. 522. Bac St L. 5.

Ld Raymd 382. Cro Eliz 236. 245 — Cro Ch. 232 2. Mc nally Evi 516 Doug. 90. 92. — The true Rule in y above case as laid down by Holt, is, if a misrecital of a Public Stat is not fatal, in y party "lies himself up to it" (I.E. y Stat) as recited, as by y words according to" or "as y St recited, aforesaid" But if he merely concludes with y words, "aforesaid" or similar terms — it ain't fatal, for y Judges will reject y misrecited one, as Surplusage, and "ex officio" notice y true Stat —

37 — The misrecital of a Private Stat is never fatal after verdict, nor upon Demurrer in Common Form, for in both these Cs, y Ct having no knowledge of y Private Stat, "ex officio" can't know, an it is misrecited or not — Indeed it is, exactly y same, as a note of hand — or a bond wh must be produced to make a Companson — P. 658. Ld Ray 382

Buc St L. 5

2 Mc nally 517 2 Mod 241. 1. Selwin 356 —

If ergo here is a material advantage must be taken of it, in either of ye following three ways, First – By "nul tiel Record" when ye Stat wd not support ye declaration. Second by claiming Oyer and Reading – ye Sc in abatement. Third – by craving Oyes, reciting it, and then demurring to it, pleading specially ye variance.

quere Variance!

When a Public Stat is to be used by way of defence it need not be pleaded specially – but when it is relied on to defeat a Specialty, it must at C Law, be specially pleaded. – Thus in debt on bond, usury must be specially pleaded to take advantage of it – Ld Holt says, ye Law deems so highly of a Specialty, yt it must be pleaded specially – but if ye true reason, ye Gen Issue, never ad in a Specialty – The true reason, is, yt usury is inconsistent with ye plea "non est factum" and whenever ye defence furnished by ye Stat is inconsistent with ye Gen Issue, it must be specially pleaded – as ye Stat of Limitation – Bac Usury A –

Chitty on Bills 198 – 1. Saunders 233. n. 2. – Ld Ray 153. Esp D. 147 –

Yes ye Law deems so highly of a Specialty – 5. Co 59. B. 113. a – 3 Salk 331 – Robert 72 – 5. Bac. 412 – Title Usury –

I have above stated yt in declaring upon a private Stat, it must always be recited, but ye recital need not be literal, tis satis, if it be substantially declared upon, wh is Lawyerlike – 4. Co 76 – 2. Mod 57. 2. Rolle 465

wh is always pleaded as well as recited –

In no case, is it necessary to recite ye Title or Preamble of a Stat. Such being no part of ye Stat, but merely ye name and reasons on wh it is founded –

3. Co 63 Bac. L. 3. 5 –

It was once held yt ye misrecital of ye Title of a Public Stat was not fatal on Demurrer, but more surplusage. It has since been determined Secus, wh latter decision, I think, is correct, for ye Party ties himself up to ye ~~title~~ Stat pleaded – 6 Mod. 62 –

Ld Raym 77 – Bac. Ab L. 5 – Harves 324 –

They shd both be qualified in ye manner Ld Holt prescribes ante 36 –

P.T.

38. When a Stat is partly Public, and partly Private, yt calle
10. Co 57. must be recited —
1 Cob. 227. A variance in y description of a Stat or record, is fatal.
3 Co 63 — Comp. 471 There y recital of Stat is necessary, ye plea
Bac. St must contain y date of y Stat and y place where enacted —
L. 3-5. or it will be ill on Demurrer — L. 8 — 1.

Cro P. 211. Cro Ch. 232. Bac. St L. 5. 2. Hawkins 246. Comp. 474 —

"Nul Tiel Record" can never be pleaded to a Public Stat,
4. Co 76. as its existence can never be made a matter of fact
2. Mod. 57. but if a private Stat is misrecited, "Nul Tiel Record"
Bac. St L. 3. may be pleaded, and must prevail, for its existence is a
8. Co 28. a matter of fact — Cro Eliz 355.

Carth. 382. It is a gen Rule in declaring on a Public Stat, y Pleader
Cro Eliz need not count upon it, he need do no more yn state
601 — those facts, wh bring y case within it — 1. Bac. action Dui Sam
1. Bac Abr 88. B. 38 —

There are Three exceptions to y above Rule —
Com D. First — if there are two concurrent remedies, one at C Law,
action on St. G. and one by Stat, & y pleader declare upon it — 1st. y Stat,
4. Bac. 18. he must also count upon it — Seeing y Ct wd not know
what remedy what remedy he intended to persue, and wd
supposed. he claimed y C Law Remedy —

2. Hawkins Second in an action on a Penal Stat, y Pltf must always
Book. 2. count upon y Statute, tho a public one, and ys extends
Ch. 25. S. 116. not only to indictments & informations, but also to Civil actions,
Plowden 200 — viz to recover penalties by Stat — The reason of ys
7 T.R. 521. Rule, I know, not, nr it is founded on y benignity wh
2. East 333. 341. 342 — to show to Criminal — for there seems to be no ground
6. Co 126 — of distinction between ys and a Civil action on a Public
1. Vent 103 — Statute —
Bac. Abr. Dui Sam K — Cheeling 32.

Bac. St Third If a Public Stat gives a new action unknown
L. 3-4 — to y C Law, he who sues upon it, 1st. y Stat, must count
Ld. Mt 634 — upon it, as well as plead it — Some of y books say,
2. East 339 341 —

, party must recite it, but y word "relating" is here used as synonimous, "with counting upon" and it seems, La Ellenborough so took it — 2. East 334.

Thus in a mixed action of trust upon y Stat of Gloucester to recover y trade mentioned, it was unknown at C Law — here y Pltff must count upon y Stat & show on what his action is founded —, such being unknown to y C Law —

But where a Stat merely extends an old action to a new case, y old fm still obtains, yt it ant necessary "to count upon y Stat" This Stat 4th Edw. 3 "de bonis Testatorum" yrs, Executors in certain cases, an action of Trespass for goods of y Testator, taken away during his lifetime, wh was unknown to y C Law — yet it has been determined yt y Executors need not count upon y Stat, as it merely extends y old action of Trespass, 41 — to y new case — Post 27 — Bac Abr St. L. 3-4

Dyer 83. B. 85. a. B. Comyns Dr. action on Stat. R.

Vide 2. Bac. 439 — Exs —

In an action on a public Statute, not Penal, it ant necessary for y Pltff to count upon y Stat, wi there is a concurrent remedy — at C Law — or wi y St gives a new form or sort of action — Hence if a Public Stat, not Penal, creates a right or duty, and gives damages for y violation of one, or neglect of y other — he who sues upon yt Stat, need not count upon it, for y C Law furnishes y action —

So if a Stat not Penal, merely creates a right or duty, without giving a remedy or damages, there is no need of counting upon y Stat, for y C Law supplies y action as in y case above and y mode of declaring also — Carth 382. Salk. 212.

If one St prohibits an offence, and another inflicts y penalty, he who prosecute on y m, must count on both, for y remedy is contained in neither by itself — Plow. 206. Bac Abr St. L 4.

Hence yt last, it follows, yt if one Stat prescribes a penalty

for a given offence, and a subsequnt Stat gives a right of
ye Penalty, to any one prosecuting for it, here he who
prosecutes, must count on both Stats, ye omission
will not be aided even by verdict.

An offence may be laid in ye same Indictmt, as an offence vs
Leases Cro Cs. 235. ye Law and Stat, but it must be in distinct counts;
to claim two penalties in one Count wd be duplicity, wh
ought to quash ye Indictmt.
If ye prosecutor is doubtful to avoid failure, he may insert
two Counts, one "contra Formam Statuti" ye other as a
misdemeanour. Suppose at Ye Law
If part of a trespass consisting of repealed act, is ye
Law, and part of ye trespass vs Stat, it is necessary
to count upon ye Stat in a prosecution for ye same, and ye
words "contra Formam Statuti" will refer to yt part of ye offence
prohibited by Stat, reddendo "Singula Singulis".

Salk. 212. Thus entering by force on one's land, is an offence at Ye Law
Carth. 382. and hunting on it, an offence by St Law. both of wh may
be sued for in one action.
Ld Holt says, yt saying yt Def hunted on Pltfs close
is satis, without contra Formam Statuti"

42 If a Temporary public Stat having expired, is revived
2. Str 1066. by a subsequt Stat, ~~extending~~ ~~in~~ ye same, it is satis and
Bac. Abr St. B. L. 3. proper to count upon ye first only. and if ye complaint
conclude "Contra formam Statuti" it will be referred to ye
first, for ye first contains ye Law, and ye latter merely
continues ye duration, or removes ye limitation annexed to ye
first.

If ye words, "contra Formam Statuti" are inserted in an
2. Hawkins Indictmt for an offence, known only at Ye Law, they
Pl. 25. Sec 116. 15. will be rejected as Surplusage, The rule is thus laid
5. T.R. 162. 552 362. down without any qualification in ye books, but it will
be found in ye books, yt ye question has always arisen post verdict
Com Dig Action. St. C. Comyn Re. 26.

No

Such on demurrer, I conceive, must be fatal, for there is an informality, wh is always a good ground for Demurrer- Post 44-

Any Repugnancy is ill on Special Demurrer, however unimportant - But note, there never need be, a Special Demurrer on an Indictmt -

Where a St gives a penalty for a new offence created by it and directs, how it shall be recovered, y offence can't be punished in any other way yn yt directed by y Stat -

A defendant relied upon y Stat of another State, must set it forth in his plea, a general allegation won't satis - in such cases 1. Mass Re. 104 - 1. East 6. and where a St directs what must be pleaded, y plea must be in y words of y Statute. 10. Mod 217 - or 2170 -

Exceptions In y enacting clause of a Stat must always be negatived in y declaration, complaint, or indictmt founded upon it - The omission of yo requisite, is so absolutely fatal as not to be aided by verdict, But exceptions qualifications - or Provisos in subsequnt substantive clauses, of a Stat, are not required to be negatived and no no notice need be taken of ym -

1. Burr 153 -
8 Mk. 542 -
7. Ro. 27 -
6. Do. 559 -
5. Do. 83 -
1. Do. 141 -
2. Mc Nally 544 -
1. East 646
Doug. 331 -

This distinction may seem arbitrary upon y first impression - but it won't so in reality - The ground of it, is, yt when in y former case, y exception is in y enacting clause it enters into y description of a right created. or y offence prohibited - and to properly describe yo, it is indispensible to negative y exception; whereas when y qualification is in a subsequnt clause, or rather substantive clause, it forms a matter of defence, and don't constitute a part of y offence wh may be described without mentioning it -

[illegible]

analogy. Exception in y body of a Covent. it must be negatived. but in a separate clause. Sea. Lacus.

Thus there is a Connt Stat enacting, yt whoever shall do any secular business, ni works of charity or necessity, on y sabbath, shall be fined. If then y complaint shd merely state, yt such a person did secular business on y sabbath, without negativing y exception, it cd not be supported, or y exception is so interwoven with y nature of y offence yt it cant be described with y negative.

But suppose y 1st section of y Stat, merely provided, "whoever shd commit business &c and y exception shd be within a subsequent section, y that it wd not be part of y description, and yr no notice of it wd be taken. This same Stat contains, a subsequent clause, yt all prosecutions under it, must be within one month, yr constitute no part of y description, of y offence and may be used as a defence, if y Def shd see cause. See Pleading. 11. or 126.

It has been before observed, yt where there are two subsisting remedies one at C Law and one by Stat, y latter of wh is called cumulative) either may be pursued. But further, if y Plff or Prosecutor elects to pursue y Stat Remedy and cant support his case under y Stat, by reason y non compliance with one of y requisites, he may in y same suit, resort to his C Law remedy. and recover as at C Law, if he can make out his case at C Law. and y words 'Contra Formam Statuti' will be rejected as Surplusage, for there is a good declaration at C Law without it. and a C Law right of action. And it is now settled, yt yr applies as well to Criminal as well as Civil cases, (tho' formerly thought secus.

2. Hawkins 302. N. 2. Burr 799. 803. 5. ante 24. Post 45. ante 42. Cowp 648. Salk. 45. 1. Hawkins 211. 280 302. 56. 2. Reb. 138. Salk 212. 2. Hales Pls of Crown 191. 2. McNally 383. 95. 5. T Rc. 169. S. Co 99. Co Elvi 231-307. 2. Hale. 71. 170. 171. 697.

As There is a Stat in Connt, wh give double damage, for Trespasses in y night Season, whereas y C Law only gives single damages, here if y Plff fail on y Stat, he may recover at C Law. This was so decided in Connt, but it supposes y Practicnt satisfied at C Law, to warrant it. So in y case of a Libel, wh is punishable at C Law,

decd. 44.

Stat, yet y party may be punished at C Law, tho' y Stat points out another, and yo is optional with y Pltf or Prosecutor –

If yt wh was no offence at C Law, is made illegal by Stat, and a particular mode prescribed by Stat a prosecute for it, yt mode it is usually said, must be pursued to y exclusion of all others. Thus if a Stat creates a new offence, and provides yt it is to be prosecuted for by information, it is said yt no prosecution of any other kind will lie – 6 Mod 86 4. T.R. 2 Cro. J. 644 – 1. Sa. 45 – 7. Co. 36 – a – 4. Burr. 2323 2323. 2. Bo 803 – 805 834 –

Bac. Abr. St. G. K. 11. Mod 174. ord hs. 123 –

and in 11. Mod 174 in wh a prosecution for usury is cited as an example, of yo rule, wh is inapplicable, for usury was indictable at C Law – I mod observe, yt neither y 10. or 11 of Mod. are good authorities –

The above rule as y general one, must be qualified and there only 2. class of cases, to wh it can apply, tho these may comprehend a majority of those wh occur under it. They are first, where y particular mode of prosecuting is prescribed under y prohibitory or enacting clause – 45 – 1. Burr 544.5 4. T.R. 205. 2. Hawkins 202. note 2. Burr 803. to 5

That mode only can be followed secondly, where there is no prohibitory clause, properly so called, but y Stat merely enacts, yt y doing of an act, not before punishable, shall be punishable for the future in such and particular manner, there is necessary to pursue such particular ~~manner~~ – remedy –

The rule holds in these two classes only –

But y reason of y above is, yt y offence and remedy are created together, and so blended in y act, yt they can't be seperated in y prosecution, for y mode of prosecuting being prescribed in and forming a part of y very clause, in wh it must be founded, it is presumed to be y intention of y Legislature, yt yo mode only shd be persued –

But on y other hand, if y particular mode of prosecuting is presented in a separate, substantive paragraph, or clause, any C Law,
2. Hawkins 302.
4 TR. 205. prosecution, wh is adapted to y case, may be pursued for such a distinct substantive clause does not oust y C Law, by mere implication As a Stat enacts, yt it shall be lawful to erect a private nuisance, and any person who does so, shall be presented by information, here there being no distinct prohibitory clause, they can't be separated in y prosecution, but if it be further enacted" &c, y offender may be prosecuted in any way -

And if yt wh was an offence, at C Law, before, is prohibited by Stat, either y C Law, or Stat proceeding may be pursued, to punish y offender, This is implied in y very supposition, yt y Stat remedy is cumulative. ante 24. 43 -

There then is a remedy independent of y Stat, wh y Stat doth oust by supposition. This rule, it is to be observed, relates to a different class of offences, from y former; yt applied to new offences, yes on y contrary prescribes a new remedy for an old offence -

46 - If a Stat creates a right or an offence, and prescribes no remedy - or punishmt, y C Law will lend its aid to enforce y right or punish y offence as a Misdemeanour - ante 41. Post 50 -

Thus if a Stat merely provides, yt no person shall do such an act, and no more, he who violates yes, act, is guilty of
1. Burn 544.
3 Lev. 290 -
Doug. 425.
Cro Eliz 655.
10. Co 75.
Bac Ab. St
TR. 6 mod. 26 -
a misdemenor at C Law, for violating y wholesome regulation of Society, and hence it is neither then necessary or proper, in yes case to count upon y Stat, for y C Law will afford a proper proceeding -

To to obstruct y execution of Powers granted by Stat, is an offence at C Law, and y indictmt for such obstruction must not be founded on y Stat, The Indictmt need not, and ought not to conclude "Contra Formam Statuti" As y St enables

commissioners to lay out highways, there an individual resisting such is guilty of an offence, at C. Law, and must be so prosecuted, for it is y province of y C. Law, to punish disobedience — Doug 245.

Of a civil remedy in such case, is sought, it is said to be by action on y Stat. 14 y right to be enforced given by Stat. but y recovery is furnished by C. Law, ante 41. Post 51 —

Of an offence thus created, is to be punished, y offender is to be prosecuted as for a misdemeanor in violating wholesome regulations of y State —

Who may prosecute on Penal Statutes?

41 —

Tis an elementary principle of y C. Law, that a private offence 4. Bl. 2.5. 6.7
cant be prosecuted by an individual in his own individual, private right or capacity, originating in y common principle of municipal law, yet a party injured by y offence, is alone entitled to y remedy and to prosecute for it — 2. Hawkins 265.

Hence as a party injured by a Public offence, is y Public, y right of prosecuting belongs to him —

Tamen ys Gen rule of Equity or Eng. Practice, private persons do prosecute offences of y highest nature, even clons, when 2. T.R. 47 — 100 — 198 — 205.
no part of y penalty is given to y prosecutor, and even by indictment — They prosecute thus in most cases, it seems 3 Lech. Com
or y costs, but yet is in y King's name, and for y King who 71. 242. 233. 257. 223. 229 —
party, is injured by crimes in all monarchical Governmts —
The individual is here considered as merely a "informer", his name not ever appearing —

The prosecution runs thus. "The King on information of A.B. vs C.d. &c" This rule depends altogether on Examples, there being no law authorizing it — This is unknown in y U. States —

When it is said, yt a public Offence is not to be prosecuted by an individual, it is not meant, yt an action wont lie vs y Offender for y private injury suffered— It only means yt an individual has no right in his own name to prosecute for an offence vs y Public— but unquestionably y party injured may sue for y ~~at~~ civil Injury—

-48- But there is a mixed species of prosecution, partly public,
4. Bl 308. and public partly private— called Qui Tam, wh is begun and
1. Bac. 37. carried on by individual in their own names, both in y U.S.
2. Chauvin 264. and in Eng. Tis a prosecution brot partly in behalf of y
3 Bl. 162. State, and partly in behalf of y Prosecutor— and derives
1. Bac 37. its name from y original words, of complaint viz "Qui
2 Qui Tam
3 Bl. 162. tam pro domino quam pro seipso" A B informed &c,
Com D. ac. St 3. 1.

Tis inconsistent to say, as is generally said, yt y State is a party to y prosecution, for it is not in any sense, strictly a party to y prosecution, tho it may reap y benefit of it— the individual prosecutes alone and is y only party, tho he does it in behalf of y State as well as himself. This is practically important tho not generally attended to—

Qui Tam Prosecutions are either by action or information. This is a rather distinction not duly attended to, in most of
3 Bl 161. 2. y books, and certainly not in Com Parlance— A Qui Tam
4 Do 308- Action is carried on, by civil process, and a Qui Tam Information by Criminal Process— This y distinguishing Criterion. I.E. a Qui Tam commenced by Information— or Capias— or forthwith is speak d— a vulgarly) is a Crim Proceeding— or Qui Tam Information— and y Proceedings are, as in all criminal cases, Whereas a Qui Tam complaint commenced by original writ— is a civil proceeding — It is then y Garb of y action yt determines its character. —

(P. 16) An action then brot by an individual in his own right,
Cow 382. on a Penal Stat, is a civil action. The action itself
7. SR 257. 4 Bo 756. 58 - 3 Do. 448 - 1. Wils 125.

does not decide its character, but y form of it. Thus an action brot to recover y St Penalty for bribery is a civil and a mere action of Debt.

This distinction wn't merely nominal, but of a great practical importance, y incidents of a Qui Tam action and a Qui Tam information being very different.

For in civil cases, y Def is entitled to 10 days notice, a criminal prosecution is forthwith: In y former he pleads by Atty, in y latter, in Propria Persona. In civil cases, y record is amendible by y Stat of Amendmts, but not so in Criminal cases. In civil cas in Eng. y affirmation of a Quaker is admissible, not so in criminal cases.

From y County Cts, no criminal cases are appealable, tho many civil are. 49.

Qui Tam of both kinds are generally brot upon Penal Stats, to recover a penalty or forfeiture of some kind, and none other on Penal Stats. Indeed as understood at present, they are treated and understood as exceptions of Penal Stats. Qui Tam strictly speaking at are unknown at C Law.

2. Hawks 377. 1. Roll 1. Cro Eliz 877. Cro J. 360-61. 532.3.

There was a proceeding of a similar nature, if we judge from y words used in it, "Tam pro Domino pro rege quam" &c. but so rare, y its nature at present is hardly known.

When y Stat gives a penalty to to him who will prosecute for y same, his called a popular action, and so called because it is given indiscriminately to y people at large. In some cases y whole penalty is given to him, who prosecutes for it, but more generally half goes to y prosecutor and half to y King or State. Com. Dig. action St. 31. E. 1. 3 Bl 162. 2. 2. Hawkins 265.

2. Bl. 43. 3 Bo. 160. Jac. L. Dic. Pb. ac.

If an individual is civilly injured by an offence prohibited by Stat, he may have his private remedy by a civil action on y Stat. The stat impliedly gives a remedy.

10. Co. 5. Com Dig. ac St A. 1. Bac. Ab. Sc.

50. A popular action ain't necessarily a Qui tam action, tho' treated as synonimous in y books, in wh they are much confounded — A popular action may or may not be a popular action, as y case is for where y whole penalty is given to y Qui tam prosecutor, it certainly is not, as he sues in his own name — but a popular action. The form yt appears in some of y books particularly Bac and Hawk — it wd seem, yt even here, y Qui tam forms might be followed, but I apprehend, they are incorrect — Post 52 —

Com. Dig. ac. St. E. 2
3 Bl 161 —
Bac. 37.

But when y penalty is to be devided, it is a Qui tam action — On y other hand, a Qui tam ain't necessarily a popular action — for y remedy or right to recover, may be limited to y party aggrieved by y offence, in wh case it ain't a popular action, and here y Prosecutor or y party must sue, Qui tam as y penalty is devided —

Having premised thus far, by way of explanation of y nature of these two actions, I shall proceed to enquire, in what cases an individual may sue, upon a penal Stat in his own name, and in any Form —

Bac. Ub St K.
Com. Dig. ac. St F.
6 Mod. 26.
2 Hawkins 377 —

Tis a general rule, yt whenever a Stat prohibits or commands any thing for y advantage of Individuals, or y protection of private rights, an individual may have an action on y Stat, for injury done him by its violation, and yt rule holds, tho y Stat is penal only and (to speak negatively) expressly gives y Individual no remedy — The examples of a nuisance (supra) well illustrate yt Rule —

51. Also if an individual is civilly injured by an offence prohibited by Stat, he may have his private remedy by civil action, (as above)

2 Ves 290.
Co Litt K. 159 —
Com. Dig. ac. St F.

Where a Stat inflicts a penalty on any one for dispossessing another of his right or interest with the making an Appropriation or for y penalty, he who is injured by y violation of y Stat is entitled to y Penalty, and may recover it by action — and not y King as y Public —, for as y legislature intends

a penalty without appropriating it, it is presumed yt it was for him, who shd be injured by the transgression, Thus an Eng Stat prescribes a penalty for not setting out tithes — where yt penalty goes to yt person entitled to yt tithe — who was injured by their not being set out. It has been said, in ye case, and others of ye same nature, yt an action lies upon yt Stat, at ye Law to enforce a right afforded by Stat and thus understood, it is true — Tithes

ante 46

The next question yt presents itself, in what ~~cases~~ cases, an individual may prosecute Qui Tam action on a Penal Stat and not merely where there is an remedy and who may have it?

Tis a Gen Rule, yt if for an offence immediately injurious even to yt public only, and a Stat gives a penalty or part one to him, who will prosecute for it, any individual may have a Qui Tam action on yt Stat, who will prosecute vs yt offender for yt Penalty — As Stat vs smuggling giving a penalty to him, who will prosecute — ante 50. Post 53 — 2 Hawks 37 & 73. 4 Co 13. Dyer 85. Comm Dig act Pr. 2 E. 1 —

The rule as laid down in yt books, is, when yt whole penalty is given to yt individual &c, but in yt case, I apprehend, it wd be at least unnecessary on principle, if not improper to prosecute Qui Tam action, as yt individual dont sue for himself, "as well as" &c, he may however without doubt prosecute on yt Stat —

If is an offence, a Stat inflicts a Penalty in favor of yt Public, and allows a sum certain to him who ~~to~~ will prosecute with effect, any individual may prosecute Qui Tam wde" — it makes no difference between a gross sum, and a part of yt penalty, and in both cases, he who first commences his action, has an interest in yt sum or penalty to be paid —

But where a Stat forbids an act immediately injurious to y Public only, ni a penalty &c is given to y prosecutor

2 Hawkins 3d. or 265 no individual can have an action upon it, nor an information

1. Bac. 3d. in his own name, for he has no interest in y Penalty, and no right of any kind under y Stat. As Penalty for smuggling, not given, ni whole or part, to any private prosecutor - and no forfeiture given him -

But if a Stat prohibits an offence immediately injurious to

4. Co 13.a. an individual, as well as to y Public, and expresly gives

12. Co. 134. Cro. E. 134 y party injured a penalty, or part, or damages for y injury

3 Bl. 161. here y party may and (de tur) ought to sue Qui Tam

2. Hawkins 3d. action ~~sue~~, for y penalty, especially if y public is entitled to

2. Ch. Pl. 187 a Fine and it seems so, tho' no fine is given to y King or Public -

Quere. however if y whole penalty is given to y party injured - where is y propriety of his suing Qui Tam Essee.? for he may undoubtedly sue in his ~~own~~ own name, without joining y Public or declaring "a Qui Tam Form"

And generally whenever a fine or penalty of any kind, is given to a party, and a part only to the party injured, fine is of course inflicted upon conviction in y civil suit, tho' y Informer isn't Qui Tam. The is y easiest & best action of trespass, at C Law - when y judgment was "capiatur" -

54. When no form of action is prescribed by Stat for y recovery of Stat Penalties; Debt is y most common and proper action -

3 Bl. 160.1 but yr isn't y only action - there is another species of action - on

Pothier 175. Bac Abr. y Stat, wh lies in yr case - (however it seems, it would not lie at C Law - he recovers a fine, tho' it will for an amercement) y theory is yr, where y Stat prescribes, yr y Transgressor shall pay a certain sum to y person prosecuting - y commencing y action to recover it, makes y offender his debtor -

It was holden in one case, yt Indebitatus assumsit wd - But yt action is never brot in England - and Pl must wd not lie -

But how can debt lie? for before y prosecution commences no personalty (penalty) is due - - The St declares, yt y penalty shall be forfeited to him, who wd sue for it, and ys positive provision of Law virtually enacts yt y offender shall be indebted to y prosecuting party for y same, nor is y doctrine so fanciful as yt assigned by some - viz yt such offence is a breach of y social compact - Carthew 92. 2 Lev. 250. Esp. D. 7.

An action of Indebitatus assumsit, was once supported to recover a penalty in y case of usury, but ys wd not be supported at present, at least wd be a hazardous experiment to y Pleader -

Where y Penalty is given by Stat, partly to y State or King, and partly to y Prosecutor, y State may prosecute and recover y whole - For y penalty is given partly to y prosecutor, merely as an inducement for him to prosecute, and not for any claim he has on account of y Public offence - Moreover where y State prosecutes, it may be said to take y penalty by halves as State and Prosecutor -

3 Bl. 102. 2. Hawk 392-2 68. 2 J.S. 11 Co 95. 5. 7 TR. 336 -

A bona fide conviction on a Qui Tam Complaint, either by action or by information, is a bar to any subsequent prosecution, suit, or even Indictment for y same offence, quia y end of y Law is obtained and punishmt inflicted -

So on y other hand, when y State prosecutes, no individual can maintain y action and y bar is mutual, for if it were seems y offender might be twice tried, convicted and punished for y same offence -

55. To y pendency of a Qui Tam action or information, may be pleaded in abatement to a subsequent information or Indictment (if commenced) for y same offence -

3. Burr 1423. 2. Hawkins 391. 2 J.S.

Cro Eliz 61. Yelv. 209. 1. Bac. 41. ac. 2 ni Jam.

many of y books, and among ym Croke says, it may be pleaded ni bar, but yo is incorrect for Ld Mansfield says, it must be pleaded in abatemt, seems if y prosecution wd be withdrawn next day, y party wd escape with Impunity –

2. Hawkins 391. 2. H. Bl. 310, 11. 3 Burr 1423 2. Lev 141. 2 Sir 1169. 2. Bl. C. 437. 1. Bac. 37.

Under a Penal Stat giving a Penalty, or any sum of money to him, who will prosecute or sue for it – no individual has any right attached to him under y Stat, till action brot for it, no person having any claim before, and he who first commences yo action, attaches yo right to himself; by commencing y action, an inchoate right is acquired, wh is consumated by Judgmt –

The penalty before action brot, is like property unoccupied, in a state of nature, it is analogous to y "hereditas Jacens of y Civil Law – I speak now of y penalties given by ought popular actions as to Remedial actions, y Rule is Secus –

Tis an essential part of yo rule, yt y Penalty be given to y person who shall prosecute, and not to y Party aggrieved –

2. Hawkins 392. Cro Eliz 138. 583 11. Co. 65 b. Rutland 82. 2 Bl 487.

When a penalty is given to any one, who will prosecute, (by Stat) for y same, y State or King may bar a popular action, by releasing y whole penalty, or granting a pardon before action brot – But if a "qui Tam" action, or prosecution is commenced, y State can release no ~~for~~ more yn its part of y Penalty or a right of recovery attaches ni y Prosecutor, by y commencemt of y Suit, and such prosecution can't be defeated by a Nole Pros –, by y Atty Gen – ni for y part wh belongs to y King, or State, for y right, "~~the~~ inchoate" is vested –

2. Hawkins 392. 392.

Nor can y State suspend or discharge a suit as to y other part, if duly commenced –

2. Bl. 437.

Tis said, yt Parliamt can release y whole penalty pos action brot – Tis hard to say, what an Eng Parliamt can't do. but I cd think yo beyond their power without repealing y Stat – Tis vs principle, and I imagine,

yt no legislature in yo country, ed do it - without repealing y Stat - so to defeat y vested right, wd indeed, wd be equally as extravagant, as to release recovery on a Private note of hand - They can't release a right vested in an individual -

But on y other hand, where y penalty or part of it is given 5/- to y party injured by y offence, yt party has a vested right in his allotmt before action brt, as a mere matter of Justice - tis a debt on y commission of y offence, wh y State or King can't release even before action brt - tis in y nature of a remedial action, wh nothing but a repeal of y Stat, wd set aside -

Even if y Penalty is more vindictive indicative in its amount, tis still considered as remedial - So far at least as to preclude y interference of y King - 2. H. Pl. 311. 2. Hawkins 302. Noy. 100 -

It seems at C Law, y prosecutor in a popular action on a penal Stat - might release his part of y Penalty, brot y conviction, wh wd be a bar to a subsequt prosecution by y same or any other party - or Plff. Tho' before such a conviction, such a release wd be of no avail - even at C Law, as to securing impunity to y Offender - For y Prosecutors right to y penalty is not consumated till after conviction, and y same Prosecutor may sue again - 2. Hawkins 302. 2. Rolls Re 33.

But yo right to release in a popular action by reason of y collusion practiced, occasioned y St 4. Hen 8th, wh 2. Hawkins 302. 2. 3 Bl. 162. so enacts yt no Covinous recovery in a popular action, shall be a bar to a subsequt action, or prosecution, brt by an individual for y same offence, and also yt no release pending y action by prosecution to Def, shall be avail to defraud public Justice - This was to provide as Cham prosecutors, and is one of those ancient Statutes, wh is prima facie y law of y L. S - Indeed, I'm of opinion, yt y above Stat is only an affirmance of y C Law as respects Covin or fraud, for if trial, there is no reasonable doubt, yt a covenous recovery, if ascertained, wd have been

1 Bun 395 void at C Law — Ld. Hardwicke says, there is no
1. Co 77. transaction, however solemn — yt fraud will not vacate,
4. Term Abridgt. Moreover ys question involves y authority of Recorder —

58. Tis further provided by Stat 18. Eliz, yt y Prosecutor
2. Hawkins can't compound y action, in any manner, till plea
397. pleaded — nor then without leave of y Ct, on pain of fellony —
1. Rol P. 18. and other punishmt, and it is discretionary with y Court
5 T.R. 88. to grant or refuse leave — and when leave to compound is
Str 167. thus given, yt part of y Penalty belonging to y Public,
1. Bac. 43. must always be paid into Court —
Com. D. act St E. 2.

Tis a rule of Practice, yt after verdict, y Ct will not give
Com. D. leave to compound, nr on proof of y poverty of y Def —
act St. E. 2. Even a bona fide release of y Prosecutor wd not at C Law
Str. 167. bar y right of y Public, to y public part of y Penalty, pending
4. Burr. 1929 y prosecution. But a bona fide release, even with leave of y
11. Co 55. b. Court, after conviction, wd bar any action for y same offence
2. Hawk 275. 392. by any other Individual, and even after prosecution commenced
Str. 92. but ys is now abrogated by 4th Geo 3th —

Suppose y Prosecutor practices fraud to defeat a public
prosecution, as to delay, as yt y St of Limitations, may bar it,
and then withdraws, wd he not be punishable as for a
misdemeanor — & I C think he wd —

59 — But when y action is given to y Party injured by y offence,
2. Hawk and he dies and releases, pending y Suit, or suffers a nonsuit —
2 Sid. 11. Co 55 y State can't proceed on y prosecution, for y Plff's bart can't
1. Co 6 b. go to y State — nor can it plead for its representative —
3 Bl. 162 The State can't become Executor to y Prosecutor —

Roe 100. 2. Hawkins 262. 3.

If several persons are convicted on one prosecution, on a Penal
for a St offence St, in some cases several penalties are inflicted, and
in others, only one penalty can be recovered vs ym —
This distinction is perplexing and has confused y Cts, counsel,
and every body else —

Rule. as punishmts are in their nature several, each of several St offenders- convicted in one prosecution, civil or Criminal, is to be a several penalty, and where y sum is precise, yt precise sum is to be inflicted, on each. however numerous y Convicts — Exception. First when y penalty is given by way of satisfaction to y party aggrieved, by y offences, in such case shall be but one satisfaction — There is a contrariety in y books on ys subject — Cro Eliz 480- Salk. 182. 4 Burr 2026- Cowp 610 Con. R. 309.

First punishd

Bac. St Kp.

Exception Second — When from y phraseology of y Stat, yt one joint penalty alone was contemplated, as thus, if a St enacts "any persons or person committing such an act, they shall forfeit." but here if y language had been, he or they shall forfeit., y case wd have been different" 2. East 573- 4. TR. 849 Salk. 182.

It is apparent-

And further, is such required an exception, this y answer y St shall seem only to contemplate a Joint Penalty, yet if y offence was punishable at C Law- ys is Sates Evi yt a several penalty was contemplated by y Legislature- tamen y contrary phraseology - for all penalties are several at C Law- and y St Remedy is cumulative and as Lee St offences are severally punished at C Law- y same must be y case by y Stat. But in all cs, an within y General Rule, or either of y exceptions, ~~to it~~, tis y intention of y Legislature yt governs-

If debt is brot for y recovery of a Penalty vs Joint offenders there can be but one penalty recovered, at any rate, in consequence of y form of y action. There is but one entire debt and so y Court must consider it. - Ergo. but one ✱ recovery, and but one entire Judgmt-

Where y St requires but one penalty, debt is y most common and proper action, and as debt lies only for y recovery of one Penalty, so where y Penalties are several, debt won't lie, as decided quia in y action of debt, only one entire sum can be recovered — 1. TR. 245. 2. East 569-

✱ Mass. 187-

And as two or more persons may join in committing one offence, so on y other hand, there are cases, in wh any number of continued acts, may go to constitute one entire individual offence. and if y offence is prohibited by a Penal Stat, there will be but one penalty recovered, for all these conjoined acts taken together, constitute but one offence - I will illustrate yis, by a former example of y Stat, enforcing y observance of a Sabbath. If a man
Cow. 640. labour yt day, he shall not incur a penalty for distinct parts of yt day, but only one penalty, y acts being in continuity. So it is y continuity of acts yt constitute battery -

60. In a popular action, y Pltf by y Eng Law are entitled to no costs, wn expressly given by y Stat or by some General Statute
2. Ld Ray 781. giving Pltf costs in such cases. But when a penalty is
1 Roll 5/4. given to y Party injured by y offence - he is as much
Salk, 206. entitled to costs in yis as in a civil action, for y Penalty
1. Hl Pl C 10 - is given as a compensation for y injury sustained, and y
2. Lawkin 2/4. costs shall go to satisfy y Party for y default of y debtor.
Cullock in not satisfying yis damage without action brot. as
17. 19. 201. he shd have done -

On Conviction y Prosecutor always recovers Costs, where judgmt is vs Def and pays costs; if Judgmt is vs himself -

Finis of Municipal. Law.

Baron and Femme.

No 1.

Of the Rights of Persons.

The subject matter of Municipal Law, is decided under two General heads. viz Rights and Wrongs — 1. Bl. 122. 3 Bl 1. The object is to guard and enforce ye former, and to prevent or redress ye latter. 3 Bl 1. 1. Bl. 122.

Tis necessary yt rights be first understood, wrongs being but Priviations or violations of Justice and right — 3 Bl 2.

Rights are of two kinds — 1. of Persons. 2d. of Things —

Wrongs are also of two kinds, Private and Public — 1. Bl 122.
Persons as contemplated by Municipal Law are of two kinds — 1 Natural. 2. artificial — or Civil.

Natural or human beings are considered in their natural capacities.
Artificial are such as are created by ye Law, and are called Corporations, or Bodies Politic — as Cities. Corporate Towns, Societies — and other incorporated companies — 1. Bl 123 — 467 —

These derive their existence from ye act or charter of incorporation, & created to maintain a perpetual succession for ye purpose of maintaining certain particular rights — and to perpetuate those rights.

The rights of Persons considered in their natural capacities are of two Kinds. Absolute and Relative —
First. Absolute rights, are such as belong to Individuals, considered as Individuals — Such as belong to ym even in a state of nature — 1. Bl. 123. These constitute what is called natural Liberty. 1. Bl. 125.
These rights, (so far as their enjoymt is consistent with ye preservation and welfare of Civil Society) are enforced by Municipal Law — 1. Bl 123, 25.

Tis obvious then yt absolute rights can't appertain to artificial persons, since they derive their existence, and of course

have our rights from y institution of civil Society

7 The absolute rights of persons comprehend 1 y right of Personal Security - 2. Personal Liberty and 3 Private property. 1. Bl. 28. The absolute rights of Persons and y principles of Law wh relate to y, being few and simple (1. Bl. 124.5) I shall treat of y in brief, giving my an outline of y Law on y subject and referring to Bl. and to y head "Wrongs" for a more particular description of y m -

First. The right of Personal Security, consists in y right of enjoying one's life, limbs, body, health, and reputation -

Second. Personal Liberty, as here used, consists in y power of "locomotion" without restraint nr by due course of Law -

8 - The right of Private property is y right of having, enjoying one's acquisitions without control, nr by y Laws of y Land. 1. Bl 138 - The right of private property is founded in natural Law - its modification, as y tenure by wh it is holden and y method of preserving it and transferring, are derived from Society -

9 - Second. As to Relative rights of Persons. they are those wh grow out of y relations of civil society, or such as belong to Individuals considered as members of civil Society - 1. Bl. 120-140 - The civil relations, from wh these relative rights result, are either Public or Private -

First as to those relative rights, wh arise out of public relations. See 1. Bl. 140 - as yl of Governors and Governed - Magistrates and People -

Second. The private relations, from wh relative rights and duties result are y four following - viz. 1. Husband and Wife - Parents and Child - Guardian and Ward - Master and Servant - These are called Domestic relations -

Husband and Wife -

Husband's right to y wife's Property -

In Roman Catholic countries, marriage is regarded as a religious ceremony - By y E Law and by our Law, his considered as a civil contract - 1. Bl. 433 -

Husband and Wife are for many purposes regarded as one Person in Law - 1. Bl. 422.

The forms and requisites of y contract, will be considered in connection with y mode of dissolving it, or y Law of Divorce - 1. Bl 422 -

ab y close -

y Legal effects, of marriage contracts, and first of y consequences of marriage contracts, as it respects y husband's right in y wife's estate - The general principle, by wh y Law as to y branch of y subject is regulated, is founded on y husband's duty to maintain and protect y wife and her estate so far only his, as is supposed necessary to enable him to perform y leading duty -

First. If a Wife Personal Chattels in Possession -

These in general are absolutely vested in y husband by marriage - For y exception in y case of Paraphernalia" of y kind - see Post - 2 Bl. 435) he may dispose of them at pleasure - and may even bequeath them - Co Litt 351. 1. Bac. 28 y. C. Baron. Feme -

If he die intestate, before y wife, they go to his administrator - 72

But he has no beneficial interest in Personal property, wh y wife has "in alter droit" as what she holds as Executrix - yet he may control, but is liable or responsible for its Ppty -

So also y husband is entitled to y Personal chattels of y wife, acquired by her during coverture - as a Legacy - The avails of her labour -

See P. 33. Bac. Bar Tem. D. Salk 115. 114 - Eq. D. 127.

As to legacies and choses vested by stat. distribution accruing to her during coverture. See Post 62.3.

II Choses — The wife's personal property in action, or choses in action. The husband may dispose of ym at pleasure during their joint lives — as debts due her, as bond, note, Cov.t Blx — Co Litt 351. Ch Bills 110. Sir 515. 3 Wils 55. Duc. C.

Com. D. B. Feme. C. 3 — But reducing ym into poss.n or some act of ownership equivalent
Pre Ch 209. — it, is required during their joint lives, to give y husband absolute
title, secus if survives to her, or his death — Post 83, and nd
1 Bl. 515 — yo, it is said to her representatives on her death, he surviving
1. Rol. 342. Bac. B. Fem C. — but for St 29. Ch. Sec. infra (but secus if an adequate
2. Bl. 435. — settlement be made on her. yo line belongs above)

He loses, tis said, all title, as husband in yo case — 2. Bl 434.5. Ved sue — see Ch. R. 21. Toller 83.4 — 3/3 — 1. Bl. Wm 44 — Salk 36 — Post 73 — 1. Rol 310.

These auth show also, yt by St 31. Edw. 3. and 29 Ch. Sec he may take it as admin.tor —
For by St 31. Edw. admn in case of intestacy was given, (in Gen) to y next and most lawful friend, who (in case of a wife's dying) was by some construed to be her husband —

The St of 21. Hen 8th, directs admn to be given to y next of kin or widow 1. Toller. 84.38 —

Toller 84. Com. D. adm B. 5 — Others holding yt he has y right to administer "Jure mariti" at C Law — and not under any Stat. Pdem. 2 Bl 515. 4 Co. 51 — at any rate he has y right by y express provisions of y St of Frauds — Lord Mansfield

For by y last Stat, y husband as administrator ant bound to
2. Bl. 515. 6th account with her representatives, i.e. not liable to distribute
Toller 373. — her effects, and thus he may hold ym as administrator,
Bac Feme C. — not liable to account —

no such Stat in Const, no such right in y husband — in Const admin^tion goes to Next of Kin in y first instance, St Const 165 and there is no special provision for Intestacy of y wife here — and none at C Law — and our St compels distribution with exception in husband's favour —

74. He cant however, either here or in Eng bequeath wife's choses, in action, for a bequest ant a disposition wh takes effect in his life time — Co Litt 351 — Bac. Bar. Tens. C — H. and even if another on husbands neglect is appointed Administrator, y husband consid^red as next of Kin, is in Eng entitled to her personal property, post payment of debts — 3. atks 526 — Toller 3/3 3. Ves 168 —

Where is yd correct or principle?

And y right it has been held is transferable to his representative, so yt if he die before taking administration, his representatives will take y Surplus — 1. P Wms 381. 2. atks 526 — 1. P Wm 382. 1. Ves 163. Toller. 116 — 217 —

75. But it is now held, yt her representatives are by Stat 31. Edw. 3^d entitled to administration and yet they are Trustees for his representatives in Equity.

75. A settlement by y husband on y wife, is said to be an absolute purchase of her choses in action, so yt he must not only have ym, if he survive, but if he die first, will transmit ym to his representatives — Pow Chy 63 - 312. 412. 2. Vern 301 — He being considered as purchaser of ym — by y settlement. 1E. in Equity — and in Equity only —

But yo rule doth hold, it seems, ni there is an express or implied agreamt to yt effect, w if y settlement is said to be in consideration of her choses. Ambler 692 3 P. Wm 199. n Pre Chy 209. 2. Vern. 64 —

But if y settlement is made post marriage, it must be adequate. Seems it ant a purchase — even tho so expressed, at least not of y whole — In yd case. y wife being in y power of y husband, her agreamt wont bind her — ni Justice is done her — 2 atks. 450 Rob. St. L. 285. n.

Arrears of rent due to y wife while sole, become absolute

2. Sk. 434.5 y husband's by marriage — But yt is by ct 32. Hen 8th —
1. Ch. Pl. 21.
2. Bac. Ab. 17. At C Law. they are upon y same footing with her other choses in action — 4. Co 51. a. Co Litt 182. a. b. 351. a — 2. Bl. 435.

If a debtor to y wife be sued, and judmt be obtained vs him.

1. Mod 170 — by husband and wife — they are Pl. assignees of y Judgmt. The claim
3. Sa. 85 — Bac. Bar. from Pl. 6 — vested as a debt, ownly in husband and wife —
1. Vern. 396.

3 Mod. 99 89 — If either die before collection, y "Jus accrescendi" wh obtains in
n. J. N. Eng, vests y whole in y Survivor — 1. Ch Pls. 21.
Not so in Eqnt, here as some have supposed, y whole goes to y wife or her representatives, sure for y Judmt converts y debt into a Pl claim to y husband and wife —

16 But even in Eqnt, y right of collection in such case, is
E. if y judgmt is unsatisfied. in y husband, if he survives — tho' subject to account, as in case of Partnership or Pl Claims. and he may sue out execution by Fieri Facias — or have debt on y Judgmt —

2. Atks 208. 220 — Husband may assign her choses in action for a valuable consid^n —
2 P. Wms. 93 — Rob. F. Con 295. — but not wtht consid^n For an assignmt carries only an
1. Br. Ch. 44 — equitable interest and a voluntary assignmt being inequitable
3 Sk. 94 — Lon. b. 308 — as to wife, a Ct of Chy wont support it and a Ct of Law cant — y interest not being assignable at Law —

Assignee has no interest or Equity vs y Wife —

But a voluntary assignmt, tho' void for y purpose of a Transfer, has been holden as an act of ownership to change y property — by vesting it in y husband — Rob. F. Con. 295. 1. P. W. 380 — But so cant Law — Rob. 295. 2. atk 208 — 1. Br Chy 44 — (Post 43)
Rob. F. Con —

1. Lon b 308 — Atk 208 — She may however release her choses in action wtht consid^n — For as he has a legal Power over y m. y release must operate at Law — and Eqty cant set it aside —

If no agmt is made already made. If y husband is obliged to resort to Equity to obtain y wifes choses in action, y Ct wont in gen interpose in his favour —

ni he will make a reasonable provision for y wife — Equitable interposition being, discretionary 4 Br Chy 356. 1. P Wms 251. 382. 458.
3 Ves 15. 510. Rob. 280-88 —

If husb. assign ym for value, y assignee is liable in Equity to y same obligations, as husband, to make provission for y wife —
Rob. 291. 94 3 Ves. 15. 506 — 1. P Wms 251. 382. 458. 4 Br Chy 326 —
For a Ct of Equity won't interpose on any other terms in favor of y assignee — They ain't liable to husband's debts after his death — living y wife, ni purchased by a settlemt (nt Supra) .77.
1. Bac. 289 — Co Litt 251 — 351 — Bac Ab Par. Com. C —
nor to be taken in Execution by his creditors during his life — For they ain't his effects, besides a chose in action ain't liable to execution — Post No. 2. p. 59 — Ibid —

Goods of a Feme Sole in possession of another by bailmt or finding, are on her marriage, absolutely y husband's, and he may sue alone — for ym —
For they ain't regarded as chases in action — They are 1. Ven. 261 —
specific chattels and in her constructive possession — 1. Keb. 641.
Bac. Ab. Rus. Fem. C. 4 T R. 489 — Esp. D. 5/6 — 1. Selwin 172.
Aliter if converted before marriage, she must then join y action, for her right at y time of y marriage, for y injury done, is in action only — Post No. 2. 59 —
3 T R. 631 —
Indeed. it has been questioned in y first case, an (if goods bailed or found,) y husband alone can maintain trover —
1. Lev. 107. 1. Ven. 261. 1. Selwin 172 — 3 T R. 631 —
What can be y objection on principle, none. For y possession of y Bailee or finder before conversion) is constructively y wifes possession — So yt her right is not reduced to a chose in action at y time of y marriage —

A constitution by wh one is bound by y husband to pay money — to y wife, is subject to his control and not to hers. The 3. East 331 —
may receive y money as it becomes payable, but can't discharge y contract, For y contract giving y wife nothing more yn a right or authority to receive y money as it becomes payable

* suppose a bailee has no right to hold it for her use — Seas in y action, for her right at y time of y marriage, for y injury done, is in action only — Post No. 2. 59 —
Bailee in hold more than she is in remainder, & Qu.

This she may do, as payment to her, is performance.
There are three different opinions on yo point in y books.

III. The Wife's Chattels Real.

Chattels real are such personal properties as savours of y Realty as term for yrs, mortgages. 2. Bl 386

Over these when vested in y wife, y husband has a more extensive right, yn over her choses in action.
The chattels real of y wife are liable during yr Ct Lives,
1 Roll 344. for payment of his debts and to be taken in execution.
Her choses in action are not so. Co Litt 46. 351. 4. St. 638. 9.

A husband has a right to dispose of ym absolutely during their Ct Lives. ~~for payment of his debts~~ if he does not, they go y Survivor. "Ct Tenant c." Co Litt 46. B Pre Chy 418. Ser 514. Co Litt 351.

7a But it has been resolved in Comrt, yt on y wifes death, during y husband, they go to her representatives. The Jus accresendi being unknown here. 2 Day 238, 388. The interest ant assignable.

In Eng nec husb nor wife can devise ym, for y right of Survivr is prior and paramount to yt of Devisee.
Pre. Chy 418. 2. Vern 270. Co Litt 351. 2. Bl. 434.

But by act executed during their Ct Lives, y husb. may dispose of ym, to vest in possession even after his death. For here a right of future interest passes instanter. Cro Eliz 287. 1. Roll 344.

So yt of y Transfer comes within y description of a disposition during y coverture. whereas a devise rests no interest till post Testators death. Litt Sec. 2. 86. Co 184. b. 3. Bac 209. 10.
They ant liable for husbands debts after his death, if y wife survive. So e converso as to y wife.

For y wifes right of survivorship intervenes and as y husband Co 184 - Litt Sec. 2. 86 -
himself cd not by will make ym subject to his debts, y act of his creditors after his death can't subject ym - nor in Eng are they are liable for y wifes debts, if she die first -

(St Tenants Page 8)

The husbands right by survivorship, excludes her executors, but according to y doctrine holden in 2 Lay 338, y rule in Comm must be different -

If a feme Sole, St Tenant of a chattel real, marries and dies, y whole goes to y other Tenant, for his title is bro to y husbands - Plow. 418 Co Litt 185. Bac. Ab. B. Tem E.2

But y husband has during coverture y same power to sever her Tenancy by an actual disposition of her moiety, as she had while sole - Ibid -

She may in Equity, assign ym without consid^n during coverture - 80 1E. Eqty can't set aside y assignment - 2. Vern. 270. Roll. 298 - 301 -
For y legal title is at his disposal, and Eqty can't control his right to dispose of it - ante 75 - 1. Vern 718. 3 P. Wms 39 -

Of The wifes Real Estate of Inheritance -

I -

In y wifes real estate, y husband has y sole usufruct during coverture. But he can't at C Law alien it alone - This power not being necessary to regulate their concerns and provide for y support of y family - 1. Salvin 11. 1. Rolle. 347.
Bac. Abr. Feme. C. 1. II 10. Co 42 -

Nor can husband and wife by yr St acts alien her inheritance in by fine or recovery - on y Ground of Estoppels - 1. Bl. 444 Litt Sec. 0 - 69. 70 - Bac. Abr. K. I -

In Comm it may be done by their St deed -

By St 32. Hen 8th, y husband and wife are enabled to make a lease of her fee simple interest, for their lives or 21 yrs - B. ad P. Cro J. 378. 22. 5 Co 9 - 2. Saund. 184. n. 9 -
22. 378 -

Such leases are ergo valid during y term, tho' y husband or wife shall die before y cessation of it –

81. If husband during coverture grant a longer estate yn for his life in y wifes land, there is no forfeiture, as in other cases, of tenants for life 9 Co. 140– Co Litt 326– Bac. B et F. P.

Litt Sec. 5 594
2. Bl. 274–

For y coverture disables her to claim y estate during his life, and if forfeited to her, y marital right wd immediately reattach on it– But it will enure only as a grant during his life at most and probably for less, as y wife may die and he not be entitled to Curtesy

Co Litt 326– Bac. P.

Suppose she dies under circumstances, wn wd entitle a husband to curtesy, can her heir on her death, claim y forfeiture? I suppose not, y grant being originally a forfeiture –

On his death during her lifetime, here real estate vests solely in her – On his death y fee vests solely in her heirs, but y husband in case of a child born alive of her, and capable of inheriting y estate, has an estate for life in y whole of wh she died seized of, by y curtesy of Eng –

Litt S. 35. 52.
Co Litt 30–
2. Bl. 126.

1. Atks 603– Pow. M– 112. 115.

He is entitled to curtesy in y wife's equity of redemption, in fee, tho' it is only an equitable interest, of wh there can't be an actual Seisin – (Mortgages 32)

In Gavelkind Tenures y husband has curtesy without having issue – Infra –

Co Litt 30–

Our Tenure of lands by a charter of Ch. 2d is according to y't of Gavelkind, but curtesy under such circumstances, has never been allowed here – 2. Bl. 128–

There can be no curtesy in a remainder or reversion, for if these y wife don't die seized – see Estates by Curtesy – 2 Bl 127.–

To entitle y husband to curtesy, y Seisin of y wife must be actual – Except in case of some Incorporeal Hereditaments, and Equity of redemption – Co Litt 29– 2 Bl. 127.

But it has been determined in Connt, yt actual seisin
wnt necessary and yt a right of possession is satis-
4. Day 298- To entitle y husband to curtesy, y marriage
must be legal, and issue must be born during y life of y
Mother- 8 Co 35. Co Litt 29. 30. 2. Bl 127-

By y birth (ut Supra) y husband is tenant by y curtesy
initiate, y title is consumated by y wifes death- 2. Bl. 28. Co Litt 30-

At C Law, arrears of rent, due to y wife while sole, wd not
survive to y husband on y wife's death 2. Bac. 17-
They wd go to y Executors, being in y nature of Choses
of action belonging to her while sole and not reduced
to possession by y husband- 1. Roll. 350 Co Litt 162. B- 4 Co 51- Co Litt 351. a Amb. 692.

But by St 32. Hen 8th they are given to y husband, they
vest in him on wife's death, and go to his executors &c on his
death

But arrears accruing out of wifes property during coverture,
go to y Survivor at C Law- This not being without within y above
St 32. Hen 8th.

The wife can have no sole and seperate property at C Law-
1. Atks 270- 1. Sowl. 87. 98 1. Pow. 103. Contra 2. P Wms 70- 3. 6.
Now a gift to her sole and seperate use is protected in Chy
vs y claims of y husband- 2. Ves. 191. 665. 1. Fonb. 87. 98. 2. P Wms 3. 6- .70-

1 Atks 270-

Sole property thus vested in y wife, y husband has no right to,
by curtesy or otherwise- Over such property she may exercise
as absolute a power in Chy- as if sole, ni yt she cant
directly devise it if real, by St 32. 34. Hen 8th 2. T R. 695.
1. Pow. C. 444-
Pow. 165. 6- 2. Ves 663. Pow 3. 150. 1. Ves. 303- 2. Do. 191- 3 Atks 393. 1. Do 270-
Now for she make a disposition by way of Trust or power-
see Post No 2. p. 40. 1-

84- The husband cannot by his dissent devest a gift to y sole and seperate use of y wife, tho he may her common purchases.
Co Litt 3 a. Co Litt 356. Bac. Bar. and F. P.
Nor a descent to her of Real Property-

For as y law casts it upon her no act is necessary to its
Co Litt 3- 356- vesting and y husband cant prevent it-
(But y wife post coverture determined, may dissent from or
Com. D. Bar. Fem. P. 2. ratify her purchases- tho' y husband actually assented for
2. Bl. 292. 3. her acts during coverture don't bind her-
Co. D. 291- Co Litt 3. a. 356. Doug. 435. Com. D. B. F. P.

After y wife was first allowed to hold seperate property, trustees were thought necessary to stand seised to her use.

not so now-
But property real or personal, may now be given to herself seperate use directly before marriage or after: even by y husband as well as others- In such cases: y state has been holden to be a Trust in y husband -

Here representatives have y same right, if after coverture ended she didn't make her election- Co Litt 3. a.
If y husband neither assents nor dissents her purchases are good during coverture- Ibid. Com. D. B. F. P. 2.

For she cant bind herself by her assent, till after coverture determined-
12. an equitable interest in a term for yrs- It has been holden, yt if a Feme Sole possessed of a Trust term for her seperate use, marries, her interest in it vests in y husband "Jure Mariti" - I cant tell Why- 1. Vern. 718. 2. Dr 250-
(Contra 2. Pr Chy 345) 2. Atks 421- 4. Co 29- Co Litt 3. a. n. 1-
2. Vern 17. Voluntary conveyances by a woman before marriage, are sometimes 112-
2. P Wm 355. adjudged fraudulent and void in Equity as to y husband-
2. Ves- 264 as on y Eve of marriage, she makes a conveyance, without her
1. Scub 99. 209 intended husband's knowledge, to a Stranger See Fraud Conveyances
2. Pro Chy 345.

Secus if made to provide for her children by a former marriage

Of the Wifes right to y husband's State.

II In Eng and Connt (under St of distributions 22 29. c. 2 – St 165.6) if y husband die intestate leaving Issue, y wife has 1/3. of y personal property absolutely. If no Issue – 1/2. debts of y husband being first paid – Pol 515. 2. Bac 427. 8.

III Dower At C Law. y wife is entitled on y husband's death, to a lifeestate in 1/3 of all y husband's inheritable property, of wh he was seised at any time during coverture – and wh, any Issue wh she might have had, cd have inherited – (Estates for Life, Dower) 2. Pol. 129. 131. Litt Sec. 30 –

The husband at C Law, can't by alienation bar her of ys right To bar herself, she must join in a judicial conveyance – In wh cases, y husband being concerned to procure y wife to join in a fine of his lands, is compellable in Chy to perform y contract specially, – as by fine or recovery – 10. Co 48 – 2. Bac. 139 – 140 –

In N York and Mass. she may bar her right by joining in a deed with her husband. For y rule in Connt vide post No 2. p. 1.2. She is entitled, (not having barred herself as before) if any issue, wh she might have had, cd inherit – Secus if any issue if any Issue wh she might have had, cd not inherit – Litt Sec. 53. 2. Pl 131.
as Dower in Special Tail –

For y following rules on ys page see Estate in Dower –

But she must have been y actual wife at y time of his death, Hence at C Law, a divorce "a vinculo" takes away y right. 5 Co 98. 1. Roll 681 – 2. Bac. 130 –

Divorce a mensa et thoro, don't, for y marriage ain't at an end –
Bac. Dower. C. Moe 108 – Cro Ch. 463 – 9. Co 19 – Co Litt 32 – 33. B –

If y husband dies before y age of consent, y wife is still to be endowed Co Litt 33. a 40. a -

But she must be above y age of nine at y husband's decease.
Litt S. 36. Co Litt 33. 3 Co 131-

The wife has dower. however old she may be at y marriage -
1. Roll 675. Co Litt 40. a -

Husband and Wife (Book 2d)

Bule Nk. 136 - Tis was formerly holden, yt y wife of an idiot might be endowed
Co Litt 31. But y husband of an Idiot cd not be Tenant by Curtesy -
2. Bl. 130. 1. Lev 41 - Tis now settled, she can't be -
Cro Ja. 125. For to entitle y wife to Dower, y marriage must have been legal -

The wifes right of dower is paramount to y claim of devisees - creditors and even mortgagees, where y mortgage is made post marriage -

Co Litt 31.35 2. Bl. 482. 4. Co 64.66. 10. Do 49 - The right to y Personal property of y husband, is ~~[illegible]~~ postponed to such claim - No. 1. P. 85. ante -

The ground of her preference to creditors &c as to dower, is yt, her title has relation to y marriage, if y husband was then seised, and y commencement of such seisin as he obtains post.
Whereas her claim to y Personal property relates only to his death -

Tenure in law by y husband, is ratio to entitle y wife to Dower - Co Litt 31 - Tho' such seisin by y wife ain't ratio to entitle y husband to Curtesy -

2. Bl. 131 For she has no power to restore him to possession, when he is wrongfully dispossessed; but he has power to restore her in a similar case -

1. Root 53. In Connt y wife is entitled to right of Dower, only in y inheritable property of wh y husband died seized, or rather wh he owned at his death -

2. The words of y Stat limit her dower to y inheritance of wh her husband died possessed - St Comnt 146 - But y word "possessed" is in yt case construed as synonymous with y word "owned" so yt actual possession or seisin by y husband, is not necessary under y Stat - She is entitled in Comnt to 1/3 of what inheritable property he owned at his death. Tho' he died dispossed -

In Comnt y husb. may defeat her right by alienation in his lifetime - but not by alienation in contemplation of death, and as a provision for his family, for yt ant any thing but a Testamentary disposition -

By our St Laws, if a man die without Issue and leaving a widow unable to support herself, and who has no relation bound to support her, his property in y hands of his heirs, and Legatees is charged with her support during her widowhood - This is peculiar to our State. Title Dower.

In Eng y wife ant entitled to Dower in y Equity of Redemption, of a mortgage made by y husband in fee, before marriage - Because tis a mere Equity and yet y husband in parallel cases, is entitled to Curtesy. Tho. 1. P. 3. 81 - But in case of mortgage term, she is entitled to Dower, if y reversion is an estate of Inheritance 3 P Wms 229. 2. P Wms 700. 1. Ports. Chy 326.

Pow M. 321.
1. Atks 606.
2. Do - 526.
3. P. Wms 229.
Talbot 35.
1. Ps Chy 326.

In Comnt and N.Y. - tho y mortgage w in fee, she may have dower in y Equity of Redemption - Ct of Errors June 1815 - Comnt Rp. 559 - C. John 290. 7. Do 278 - Her right in Comnt as in England is paramount to yt of y husband's devisees and creditors -

2. P Wms 700.
1. Comnt

2.

The right of Dower may be barred in various ways - as by Divorce - (Supra) so also of alienage, as if a citizen of U.S. marry a foreigner. She cant hold any interest in his real Estate, whence it is usual to obtain from y Legislatures a special act entitling y wife to hold

to hold real property.

When a foreign woman becomes naturalized, y disability ceases.

The wife is barred by elopement with an adulterer by St West. 21. Co Litt 32. 3 P/Wm 276. 1. Rolle 680. 2. Bl. 136-7.

3- So by Divorce à vinculo matrimonii"

So by alienage, except in case of y Queen-consort.
2. Bl. 131. 136.

2. Bl. 130. 36- So by Treason of y Husband-
but not by her felony since Stat 1. Edw 6th, for in consequence of y attainder, his issue did not inherit y estate - No such rule in Christ. nor can there be any by y Laws of U. S.
Art 3. 2. n 33- 2. Bl. 136. 30.
Art 3. Sec. 3-

Here Neither y heir nor widow can be barred of their rights by y husband's treason.

Plow. 85. By detaining y Title deed from y heir at Law- her right of Dower is suspended. till she restore them - and if she deny y Detainer and it is found vs her, she is barred forever-
3. Co 17. 18.

2. Bl. 130. n. 3 Bl Com 230. So if she aliens in fee or for life of any other than herself- she forfeits it by Stat of Gloucester 6. Edw. 1-
1 Litt Sec. 4. 15. Co Litt 221- 2. Bl. 274. 5.
not yet work a forfeiture, like any other Tenant in life-

2. Bl. 137. 8. By accepting a Jointure before marriage. Post 44. 5-
1. Bacs. 173. Eyre 358. 2. Bac. 140- Dower - F.

4. So by Barring y husband in levying a fine, or suffering a recovery of his inheritance during coverture - ante No. 1- P. 85- She is preventing from averring her coverture - These are y only modes, in wch she can alien her property
10 Co 48. or inheritance during coverture.
Bac. Dower F. In theory of Law, y principle on wch she thus alien

alien her estate, is not yt she can any way during coverture, alien her real estate, but merely by matter of Estopell, wh prevents her from averring her coverture - for if yt fact cd appear to y Ct, neither a fine or recovery wd bar her right of Dower -

Divorce a vinculo §c dont work a forfeiture of Dower - in Comnt, ni y wife is y faulty person. - If she is y faulty person, dower is barred -

But our St seems to imply, yt a woman being absent from her husband without his consent, and without just cause, aint entitled to Dower -

Paraphenalia Sole 229 -

The wife is entitled also to certain articles of property, called Parphenalia - if something over and above Dower - as her Apparel. Bedding. Ornaments (Post 6)

Tis sometimes difficult to distinguish between yse description of property and yt wh a wife may hold to her sole and seperate use - a difficulty arising from y minuteness of many facts into wh an examination wd tend to run to perfection

As to property holden by y wife to her sole and seperate use, y husband is a stranger - She holds it to y utter exclusion of any right in him - Not so as to her para phenalia - especially of y 2d class. Post 6 - Property to vest exclusively in a Feme Covert, must be given to her sole and seperate use

But no particular form is necessary, y intent being apparent - is satis - 3 atks 393 -
In some cases, y intention is infered, not from y terms of y Gift or Transfer, but from y nature of y property and y ~~terms~~ circumstances under wh it is given. Tortb 93 - 98.
as Diamonds, Plate - given by y husband's father

to y wife on marriage day, has been holden as her seperate
3. atks 393- property; and a similar gift of a stranger, may be so. Trinkets
given by y husband himself in his lifetime, are also in some
cases, y wifes seperate property. and they are or not, must
depend upon y intention with wh y gift is made-

This distinction is important, and when it is obscure - as in
y case of Covenants above) y its nclina in favour of y wife.
Aliter if bequeathed to her by y husband, she have no other
Title - Then she takes as Legatee, wh presupposes yt y
Property was y husband's - It may ergo be subject to his
debts - Post 8-

And property given to y wife by y husband, even in his
lifetime, for y purpose of being worn as ornaments of her
Person, is not her seperate property in y above absolute sense -
as is his creditors, (3. Atks 394) but is liable under certain
qualifications for his debts, Pl. ergo comes under y head
of Paraphernalia -

D - The wifes property called Paraphernalia, is of 2 kinds -
First necessary apparel and Bedding - 2d ornaments
as Trinkets. Jewels - ye in gen - 1. Roll 911. 2. Bl. 535. 6 -
Comyn D. B. ch Fem. F. 3.

1. P Wm 730. The power of y husband over these 2 classes, is essentially
2. atks 77. different - During his life, Paraphernalia of y second class -
3 Do. 358. 955. Cp 2. 578. are at his disposal, but accordg to Mod - authorities, he
2. Bl. 436 - Cant bequeath ym . . . . . .
Contra Co Ch. 250. or 353. 4. 1. Roll 911. overruled -

Those of y first kind cant be taken by creditors, nor
can husband sell ym -
Husband creds cant take y ~~second~~ class in execution, the
surely cant sell all of ym - indeed wd be a misdemeanor.
She is entitled at least to one bed and apparel suited
to her quality - Com D. Bet F. F 3. Perk Sec. 500. 2. Bl 436 -
1. Roll 911 -

Paraphenalia of y second class are assets in y hands of y husband's executors, and to pay debt post y other personal property is exhausted, but not before. 3 Atks 330. 1. P. Wm 730 –
The wife's claims are paramount to his representatives but likewise yt of his legatees.

Land being at C Law, liable in y hands of y heir, for specialty debts, if y specialty creditors take y wifes paraphenalia of y 2. class, she will be considered as creditor in Chy vs y heir, for so much in amt as those creditors have taken of y Paraphenalia –
Here right to y m being preferred to yt of y heir at Law – 1. P. Wm 730 –
to y inheritance Sole 422. 3 Atk 369. 93. 2. Atks 77. 104 –
Aliter if taken by Simple contract creditors, since they ed not have taken y real Estate. She has a lien on y land, only when her paraphenalia are taken, when y land in y hands of y heir might have been subjected in stead – 2. Atks 104. 5.
Here, y land is liable to both class of Creditors –

But if y Husband create a Trust Estate in lands for y paymt of debts, they are liable for debts on simple contract –
The personal property is first liable however –
If then in such a case, her paraphenalia are taken (y personal fund being deficient) for even simple contract debts, y wife will be considered as a Creditor in Equity – vs y heir –

Aliter if there is no such Trust: for in yt case y Simple contract creditors ed not have taken y Real Estate, Ibid. (* of y second class, for those of y first ed not be taken by y husband's creditors –

Jewels wh y husband keeps in his own possession but permits y wife to wear as ornaments – are Paraphenalia –

A settlement or Furniture on y wife, before marriage expressed to be in bar of all demands vs husband's estate, (or after

marriage, but in persuance of articles made before marriage) stipulating yt y settlemt shd be in ~~persuance~~ bar of all demands. takes away her right of Paraphenalia of y Second class –

Here acceptance of y settlemt, being a waiver to or of her claim to ym – Secus if y articles are made post marriage and not in persuance of Mon^to before marriage – (ut Supra) for she was not "Sui Juris" at y time of makin y settlemt.

Quere settlement if

9. It has been holden yt she has y same right vs y Devisee
1. P Wms 730. of Lands as vs y heir at Law: for her claim is preferable
– yt vs Legatees or Devisees – 3 Atks 221. 395. 432. 3 –

But as, to Devisees, yt is said to be doubtful, and may now be considered as questionable. Toller 231. 422. 23.
Ambler v. 2 P Wms 544. n. 1. 2 Ves 7.

If y husband pledges y second kind of Paraphenalia, y wife's, not y executor of y husband, has y right of redemption, and if there is a surplus of y personal property after paymt of debts, she is entitled to it, to redeem y Paraphenalia, even to y exclusion of Legatees – 3. Atk. 395.

The wife's right to redeem paraphenalia of y second kind property vs y disposition of y
2 Com. 2. 46. 7. husband, is strictly personal, and of course not transferable
1. Roll Abr. or transmissible – So yt if she dont claim ym as Paraphenalia
Co Ch 343. 4b. her representitives cannot – A husband bequeathes Paraphenalia
10 – of 2. Class to wife for life, remainder to another, vs y wife holds ym during life, as under y will. not claiming ym as Paraphenalia – On her death, they go to y remainderman not to her executor – for as she made no claim to ym as Paraphenalia, y Ex or Adm^tor cannot –

Swd have been secus, had she claimed ym as Paraphenalia

10-2

In Comnt real as well as Personal property is liable for all debts, and as y Executor, if he sha take y Paraphernalia for paymt of debts, wd himself be immediately be immediately liable to reimburse y. widow, if there were other assets -
Quere can he take ym at all, ni both funds are exhausted!
If he can y widow will be creditor to y amt of ym - vs all y Estate of y deceased - real and Personal -

In addition to y widows usual share under y St of distribution, necessary household goods, are to be allotted her by Seat in Comnt, when y Estate is insolvent. St Comnt 275. 6. 280
This rule is extended in practice to other articles, to money -
Quere ant it also extended to Solvent Estates -

Husband's Liability on Wifes Account.

The husband and wife are Jointly liable. 1. For her debts - 1. Roll 351.
11. 2. For her torts - 3. For her crimes, in some cases - 1. Co Co 60. 11.
They are Jointly liable during coverture for her debts - 7. Rb. 348
contracted while Sole - But yo liability ceases on her death 1. Bl. 443 -
ni judgmt has been recovered vs ym before - 1. Selis. 337. Ev B. 122.
- Carth 30 - 3 Mod 186.

For as his liability as it grows out of y relation in wh he stands to her, ceases with it -
Tis secus if Judgmt has been had vs ym, for y Judgmt alters y debt, by converting y original duty of y wife into a St duty of y husband and wife - Ibid. Post 68 -

If then she die first, no Judgmt having been recovered (nt Sts) 1. Bl C. 443. n.
y creditor loses his debt, ni she leave assets - or chose in action -
Co Litt 351. 3. P. W. 498. 1. Do. 468. Ev B. 122
If he dies first. y debt survives vs her 3. P. Wms 498. - 1. T. R. 343. 07.
Tho her executor ant liable - Ev B. 22. 12.
12. The principle of y husband's liability is yt y wife by marriage loses part of her property and y enjoyment of y rest, as well

1. Str 486. 1. Bl 352. 3 Mod. 88. Richardson 265. as y avails of her labour - and thus is deprived of y means of procuring herself from arrest and confinement -

She ought not to be personally liable to a Suit without y husband

This applies to y principle of her liability both for her debts and Torts -

Salk 115. 1. Str 486. Cro J. 445. 2. Bl R -720 - 1 Mod 148 - 3 Do. 124. And hence she can't in any civil action be taken and holden alone on mesne process - for her debts or Torts. she must be discharged in yd case on common - B. nominal bail - quia she can't procure bail, quia she can't procure indemnity - Com D. B R. 6.

Except when action is brot vs her when sole, sundry with the marriage. she then continues liable to be holden alone, for she can't by her own act, abate a proceeding vs her, wh was originally regular, for she was originally regularly held to bail and she can't defeat y Lien of y Creditor

Cro E. 323.

Esp D. 328. 3 Bl 414 1. Salkeld 314. 4 East 508. In yd case execution goes vs her alone, and she is liable to be taken upon it alone

In such case. y creditor (Pltf) may by a Scire Facias obtain execution vs y husband & herself, without a Scire Facias, y whole proceeding wd appear erroneous, and not conform to y record -

1 Salk 315 Carth 30 - 3 Mod 170 -

13. If both are taken on Mesne Process, she is discharged on Common Bail and he remains in Custody till he puts in Bail for both -

Str 1272. 1. Term. 48 - 2. Bl R. 720. 1. Lev 210.

Contra Rent 48 - Wd no one it is supposed, will become bail on y responsibility of a person having no property at command nor legal capacity to act -

If she is held under arrest in violation of these rules, wh cannot, she may in General obtain a discharge in a summary way by a motion in a Ct ~~Pleading~~ ~~Ass~~ Passing y Process - If necessary by habeas Corpus, as when y Ct is not sitting -

But she will not be discharged in a summary way (R - on motion) when arrested alone, as Feme Sole, wh y coverture is notorious

Still less if she has imposed on y Pltff by pretending to be a Feme Sole: She is left in such case to plead her coverture — 2. B R. 9. 3. 720. For y application by motion is to y discretion of y Ct — nor if her husband be an alien — 2. Bl R. 380 — Salk 64. 66 — 1. and out of y reach of y Process — 2 N R 340 — 1 N R. 51 — 2. Bet P 233 —) For in such case, as y husband can't be sued, y Ct will not upon a plea duly — at their discretion, discharge her. The above Rules all apply to Mesne Process —

But if taken alone on final Process as both, she can't discharged, nor there is a collusion between Pltff and Husband — to keep her in Prison — This exception is founded in humanity

For upon a Final process bail can't allowed, and ergo y body of y wife as well as yt of y husband is eventually liable for y debts — she must in ys case remain in Custody — 1. Lev. 50 — The reason, wh she can't discharged on Final Process, is, yt y object is to obtain satisfaction for y debt — This a compulsory Process, and on it, bail can't allowed — Contra Lev. 51. not Law — Ast Law — Con an 1. Lev. 51.

Sir 327. 123. 1. Ld. Esp. D 32. 2. Ab. R 720 — 1. Ni. Ld 124 —

A fortiori, if y husband and herself are both taken on final Process — there can be no ground on wh she can be discharged.

II. Husbands Liability for y Wife's Torts —

The husband is liable Jointly with y Wife during Coverture, for her torts committed while Sole — The law is y same — if she alone, and without y direction, approbation, or consent of y husband, commit a Tort during coverture —

Cro Car 301. 3. Bl. 114. Sir 123. 1. Ni. 140 — Cro Eliz 8. 55. 1. Roll 351.

The wife in these cases is y only guilty person. They are jointly liable for her Torts only then, in those cases, in wh y wife both in fact and in Judgment of Law, is y only guilty person and he is made liable with her, quia she can't be sued alone —

1. Salk. 3. 4. 4 Bl. 28. 1. Roll. 348. But for Torts committed during coverture by his command (tho' in his absence) or by her Jointly with him, or in his company, he only is liable –
Cro Ch. 184. or 355. 254. or 481.

It is then deemed his sole act, or in these cases, she is supposed to act by his coercion. Post 70. This presumption cant be rebutted. Where husband and wife are Jointly liable for her torts during coverture, she continues so post his death. Palm 313. (Cro C 366) 519) For in all such cases, y injury is done both in fact and legal contemplation, by her alone – and his liability during coverture is founded on her privilege not to be sued alone. But when they are so liable during y coverture, his liability ceases with y coverture. For in such cases, he ait y guilty person. tho' liable with her to be sued for y wrong. Cro Ch. 371. 4.

When he is liable alone during y coverture, y action doubtless survives vs him, y tort being considered in such cases as his sole act –

III Husband's liability for Wifes Crimes –

The husband in some cases, is liable alone for y wifes crimes – as in cases of bare Theft committed by her thro' his coercion – or in his presence, he is liable alone – y act being considered as his –

1. Saunders. 4. 1. Hales. Pl. Cr. 65. 2 Ro 40. For y coercion actual or presumed, excuses her (Do not y rule found in part at least on law relating to Benefit of Clergy – ? men being entitled to it and women not?
4. Bl 29. Ch. in) The rule is said to be y same as to Burglary – Hawking 31. 4 Bl. 28. 1. Hale 40.

Keeling 31. 4. Bl. 29. 1. Hawkins 4. But y wife is liable as sole, if she commit y offence voluntarily, as in y husbands absence, and even by his bona fide command. Such command falls short of Coercion. For mere misdemeanors committed by both, she is liable

with y husband, y husband's presence, coercion, or command dont excuse her - 10. Mod 63. 335. 4 Bl. 28.

Why ant she excused in a mere misdemeanour, as a Simple theft wh is a higher offence? Here y doctrine of clergy, (nt Pub) seems to clear y difficulty and seems to intimate or indicate yt her exemption in y former case, arises out of y doctrine - and Takes y general Theory of y Law to be, yt y coercion of y husband dont excuse y wife - For y above distinction 4. Bl. 19 n Ch -

If y doctine of y Clergy is assumed as y reason of her exemption it wd clear away many difficulties, and reconcile many contradictions -

And For higher crimes, as for Treason. Murder. robbery committed by both, both are liable, tho y husband used coercion - For by reason of y enormity of y offence, y supposed coercion ant allowed as an excuse - Because these offences are ousted of Clergy and if committed by her alone, she alone is liable - 1. Hawkins 4. 4. Bl. 29. 2. Ser 1120. Hales 815.

10. If a wife incur y penalty of a Penal St, he is bound to pay it, tho' she commit y act alone, and without his privity - The Penalty is in y nature of a debt. See Municipal Law 53-54 2. Bac. 294. 1. Hawkins 9. 5.

In yo case he is liable with her and may be made with her a party to an action or information.

She ant guilty as accessary in felony in receiving and assisting her husband after y fact - This rule is founded on indulgence shown by Law, to y relation, in wh they stand to each other, not to any supposed coercion - 1. Foster 4. 1. Bl. 38, 9. 2. Hawkins 45. 1. Ro. 44.

In all cs to wh y above exceptions dont extend, y wife is liable for crimes as if Sole - 3. Co 7 2. Roll. R 83. Cro. J. 482. 3 Inst 6. 34 - 1. Hl. Rep. 1

Of the wifes power to bind the husband by contracts during coverture.

Her power to bind y husband during coverture by her contracts, is said to be founded on his assent, Express or Implied. 1. Rol 351. 1. Bl Com 430. 1. Selwyn 28, 80.

17. But y husband is often bound by her contracts, when he expressly refuses to be bound (IE. his consent) as if he refuses to provide her necessaries, she can bind him. this for any thing besides necessaries, she can't as wife. 1. Selwyn 120. Esp Dig 122. 1. Rol. 351.

1. Salk 34
1. Bl. C 442.

His assent in fact is not necessary then in all cases, to his liability on her contracts, and his dissent won't in all cases exonerate him. Perhaps a more simple and obvious statement of y Principle, on wh he is bound by her contracts for necessaries with his actual consent is, yt he is under obligations as husband to provide her with necessaries IE food. raiment medicine, and such as are suitable to her rank, and from his duty, y law implies his assent and y implication can't be rebutted.

2. Lev 4.
1. Ld Raym 182.
Esp D. 122. 124.
6 Mod. 239.
Salk. 118.

18. The husband, tho an infant is bound for y wifes necessaries, as he wd be for his own. Str 166. 1. Sordt. 6. For by being bound by the principle contract (IE of marriage) he must be so y those wh are incident to it.

19. Cases in wh y wife may bind y husband, clearly on y ground of assent. First where there is express assent by y husband before y contract. 1. Bl 420.

Second. Where assent by y husband is expressly given. First 1. Selwyn 120 1. Rol 350.

Third where y wife usually provides necessaries for a family and husband says for one IE. has a General Authority.

1. Bl 430. where y husb. has son allowed her to contract. 1. Selwyn 128.

Where there is implied consent antecedent to contracts of y same kind, wh she post makes—

Fourth Where necessaries provided by y wife, come to his use or yt of y family— In yo case there is an implied assent subsequent. 1. Bl 429. 3 East 333. 1. Selw 120—

In these cases, the wife acts in strictness as Servant and y contracts she makes, are y contracts of y husband considered as Master or Employer— 1. Salk 118. 2. Ven 155. 2. Str 1214—
1. Selwin 109. 20.6. . Rol 351—

A general credit given to y wife, (as in 3d classes of Cases)— can't be determined by any private prohibition, so as to defeat y claims of those who post trust her on y account of y husband.

For credit given by one to another, can be withdrawn only by notice, coextensive with it— Secus wd be defrauded— 1. Bl 430
1. Show. 95. 2. Ven. 643—

If y wife not having a General credit, purchases cloathes without husband's knowledge and pawnes ym without having worn ym. y husband ant liable, for here is no Express assent antecedent or subsequent. Secus had she worn ym and post pawned ym, for then having come to his use wd imply an assent subsequent— Ibid— Salk 118. 2. Le Ray 1806. Esp. D. 123. 126 Bac. Ab. F.—

Upon y same ground of distraction, (without husband's privity) she pawn her cloathes before or post wearing and borrow money to redeem ym, he ant liable for y money— Besides borrowing money, ant a contract for necessaries— Semble, of any other article. The rule thus far laid down, presupposes yt y husband has been guilty of no neglect in furnishing necessaries — for her— 1. P Wm 183. 1. Rol 350. Esp D. 128 2 Show 283—

21. If a husband turn away his wife, he is liable at all events for her necessaries, ni she commit adultery— 21.
" Contract 16" 1. Selw. 230— 6. T.R. 605. 4. Burr. 2178.
1. Dow. C. 138. b. 2 Bos, Gr 875. 1. H. H. 348. Salk. 118— 1. Bal J. 399 22 E. n.

Adultery is a satis cause, and (y only one wh will exonerate him from supplying necessaries) for turning her away — and if y husband does it, he ant liable

But in y first case, it (where she ant guilty of Adultery) no prohibition general or special will avail him —
1. Salk 118. Str 1214. Esp D. 124. The husband consents to her contracts for necessaries, Kata Salk 118 — Str 1214 — or rather his duty to support her, gives her a General credit for necessaries. (Esp 124) and y Law raises a promise to him to pay for ym —

If a man cohabit with a woman, and allow her to use his name, as his wife and appearing so to y Public, he is liable for her necessaries, tho' not married — Ergo "not lawfully married is a bad plea in an action for a debt contracted by her — 'he holds her out as his wife'"
1. Selw 13. Q. 04. 387 Lev. 41 Bull N. P. 136. Esp D. 124. Salk 43.
Bac. B. F. -A- So in a suit for a debt due to her, y rule is y same — So in action for Torts by or vs husb and wife —
Comb. 131. Bac. B. F. A.

Sed Quere on what principle? can they join as Plffs (Pleads 39) on no principal. If y rule be true, law gives no right to a man by a breach of Policy and good morals

1 Levin 41 Bull N P 146. Such a plea is good in an action for Dower, and on appeal, so it is a good defence in an action for criminal conversation — Ld Mansfield says, y marriage must be Esp D. 125. Lawful to support y action, because y charge is of a Criminal nature — See. Page. 43 of ys Title

If y husband and wife part by agreement, or y husband allows her a separate maintenance, he ant bound for her necessaries post y separation is generally known in y place in wn he lives. (Post 27)
and pays y alimony

22. Whether known or not to y person trusting in y place where trust is given, it ain't material, it enough if known generally where he resides — Salk. 116. 12. Mod 244. 1. Ld Ray 444. 1006. 6. Do 147. Esp D. 126 See Page 27.

22.

Such a separation is a revocation of y credit wh marriage gives her on y husband's account, and Ld Holt says, yt y credit must be presumed to be given to y wife on her own account — But whether so presumed or not, y husband is not liable — Ibid

If y wife living seperate, has no seperate maintenance, y husband ain't discharged — 4. Burr 2078. 6. T.R. 604 — Esp D. 126.

If y wife leaves and lives with an adulterer, he ain't liable, after y elopement is notorious — Salk. 116 6 Mod 171 Esp 125 — 1. Bl. 442. 3 — Str 647 1. Lev. 8 — and hence y current of authorities, he ain't liable at all, even if her elopement is not notorious — Esp D 125. 1. Hl Pl 348. See Infra —

For by such an act, her rights as a wife are forever forfeited — Hence husband is discharged forever — 1. B et P. 338-339 — and y husband ain't bound to receive her again, 6. T.R. 603 — Nor is he liable for her necessaries, after refusing to receive her — 1. Stra Pl 348 12 Mod 244. 6. T.R. 603. Ld Ray 444 — 23 — 2. Str 875

Sed Quere. as he has given her a credit with y Public, wh ain't in any way revoked, so far as regards y knowledge of y Public — This is rather too much in favour of y husband, it seems hard, yt he shd be exonerated, till he shd have given notice —

But it seems to make no difference an y elopement is notorious, an tis adulterous or not, he ain't liable — The rule seems to be, yt y husband ain't liable, tho' y elopement ain't adulterous — 2. Str 875 Salk 118. Esp D. 125. 1. Pow. 95 1. Ser 102

24 — If a wife elopes with an adulterer, and post offer to return and y husband refuses to admit her, he must support her and of course is bound for her necessaries.

Esp. D. 125. Str 875. 1. Bac. 298. 300.

For a mere elopement is not a perpetual forfeiture of her rights; it's but a Temporary Forfeiture of ym, it. as long as Elopement continues.

Contra, Salk 119. 119.

25. In ye case, it. post her offer to return, a general prohibition restraining her, is not good. A Special one however is good. For tho' he is bound to support her, yet post such misconduct, she can't arbitrarily select creditors for him as his will and prohibition.

Str 5, 5. 3 T R 603. 4 Burr 2177. 1. Ser 4. 1. Mod 124. Bac. H. B. Feme 1. Selwin 103.

If however he leaves her at his own house with children, having made no provision for ym, tho' she live in a state of adultery, he is liable for her necessaries, provided y Plff didn't know of y adultery. For by leaving her in such situation, he gives her Prima Facie credit with y Public.

1. Bos. & 226. Str 647. 7.05. 652 603. 1. Salk 119. 6 Mod. 171.

But tho' y husband ant liable for her necessaries during elopement, not adulterous, neither is y wife, for she is still a Feme Covert and y marital rights are entire. it. can't be violated. The creditor must credit her at his Peril.

2. BL 1089. 1. Pow. C. 96. 8. T. R. 547. Str 875. n. Esp. D. 125. Bac. B. Feme. + +

It has been holden secus. if she lives in adultery during y Elopement. For as she may forfeit her own rights as wife, how can she impair his? This Principle ant Law. for in yt case she wd obtain rights by an adulterous Elopement. Tis an obiter opinion. See Page 32.

1. Bos & 338.

24 — Where husband and wife live separate, and husband is liable for necessaries furnished her (ante 22) & goods, it is said, shd not be charged in y declaration generally as

Str 127.

furnished to him, but y special matter shd be shown — Becaus y cause of action wd not be identified, so as to be a bar. (Str 127) Quere ant y former mode of declaring according to Legal effect.? (So Gould Mun.ks) But ant agreable to analogy and I cd never see y necessity of it — Provision. If y husband provides necessaries, for y wife at home, he has a right to prohibit y Public as well as any individual to trust her at all and may discharge himself — for y end of y Law, is attained. 1 Lev. 5. 1 Salk 109.

And he may thus terminate any credit, he may have given her, with y Public or individuals. Salk 118. 1 Ld Raym 444 — 1006. But he cant deprive her of necessaries. Esp. 122. 1. Bl 442. Salk 118. Ld Raym 1006. She may deprive herself by misconduct. If he refuses to provide ym she may get ym on his credit — (Ante 17) 1. Bl 442. Esp R. 122.

25. If y husband turn her away without cause, he is liable for her necessaries, and I presume, y rule is y same. If she leaves his house by reason of bad treatmt, wh wd render her residence intolerable — no analogous case in y Eng Books but in yo State. (Comnt) there are (Post) a father abused his son and his representatives were holden liable as a Gen or Special prohibition — 2. Str 1214. 12. Mod 244. Salk 118.19. 3 Day 37 & 38.

For here y husband is y aggressor —

For money lent to y wife, y husband ant liable under any circumstances, unless it is actually expended in y purchase of necessaries, and then only in Equity, because there is danger of misapprehension (deception) or, y Law wont favour y Lender. and as y contract at Law is good or bad at y time of Lending and ant affected by Matter "ex post facto", it must be enforced at Law without reference to y application of y money or not at all — Hence y husband cant be subjected at Law but in Chy — y lender stands in place of lender, and recovers only y amt of necessaries — And less yn y sum lent — Salk 297. 38. Pre Chy 502. P Wm 453. Same of an Infant.

A woman in y County of Tauntfield. Consist. brot a bill for divorce for "wilful absence" and supported it by proving yt she deserted him for y intolerable brutality of his Conduct
Sup Ct. Case not reported.

27. If a husband and wife seperate by deed, y husband stipulating an allowance for her maintainance, and y allowance ain't duly paid, he is liable on her contracts for necessaries — 2. T Rs. 148. Contra. (Mansfield.) For here y condition of his exemption from liability is broken. Post 31. Justice Mansfield didn't concur in y decision 2. T Rs. 148 — but L Mansfield, y others Judges fully demonstrated it.

Of the Wifes power to bind herself and Property by her own Contracts.

By y Gen Rule of y C Law — she can't make herself liable or or subject her property by her contracts: Mo' she may in many cases bind her husband. The reason generally assigned is, yt her existence is merged in y husbands, yet she has no will distinct from his. 10. Co 42. 1 Roll 347. 1. Bl 442) It don't seem necessary to resort to so technical a reason — for y true principle of y Rule is, as y law has in favour of y husband deprived her of her property or disabled her to dispose of it, hence she is bareledged as all Personal Liability

2d The husband has a right to her person, and if she cd bind herself, yo right might also be infringed

3d If she cd affect or subject her property, his right to yo might be defeated — ante 12.

The presumption yt she acts in all cases under y coercion of her husband, seems to form in gen part of y true reason of y rules — For if she cd enter

into a contract confessedly as his wife, it certainly
wd not bind him or her

Her contracts at C Law are not regularly voidable
merely, but void. 1. Pow. 90. 97. 1. Salk 7.
2. P Wm 144. 2. B & C. 293.

But a redelivery of her deed or bond after her husband's
death, or what is equivalent to it, will bind her. Pow. 201.
This being a reexecution virtually, as yt in Law, is 4. Cruise 20.
a new deed - For every deed takes effect from delivery
i.e. from y date of y last delivery (not valid "ab
initio" but from y redelivery -

28 -

Her Leases, however are only voidable. This exception to
y Gen Rule is allowed for y advancemt of agriculture

And if she joins y husband in a lease of her lands, for
life or more yn 21. yrs. and accepts rent after his death -
she is bound by y Lease, for she thus affirms it - The 2. Saund
husband can avoid y Lease, tho' she can't during 180. et n.g
coverture, for y avoidance wd be of no greater authority Cro Ch
yn y Lease itself - 1. Chit P. 43. 563 1 Roll 225

In yr case however after she becomes discovert, she may
ratify or annul it, as where she leases alone - 1. Roll 349 -
1. Leon 192. Com. D. B. T. G. 3. R. S. L. Ple's. 225.

It being as to her voidable - 1. Leon 192 -

If she ratifys it, she becomes bound by y contract - 1. Ch. P. 43.
for she ratifies it "ab initio" 1. Mod. 291. Cro J. 563. 4. 2. Saund. 180. n (3).

If a lease be made to husband and wife, and she agrees
to it after his death, she is liable on such of y contracts 1. Roll 349.
as are running with y land, tho' not upon such as are 2. Saunders
180. n. 9.

as are collateral, wd charge y Person — 1. Ch Read. 43.

1. Rolle 349. Com. D. B. F. Rp.

If an obligation be given to Baron and Feme, she may refuse y benefit of it after husband's death, and after such waiver it inures to his representatives, as an obligation to him alone — "Deed" 61 —

If a husband and wife are made Tenants in Common, she may disagree to y purchase or gift after his death — 1. Rolle 349 — 3 Co 26 — and when waived, it will inure as an Estate originally conveyed to husband — for by y waiver, it is waived as to her "ab initio" or by relation. 3 Co 27. 8.
In D. Bar Fem. R.

3 Co 26. But if y Estate is a Freehold, a waiver by Parol, ain't effectual she must disagree in a Ct of Record. This is necessary by reason of y Law's deeming so highly of a Freehold

On y other hand, she may assent to it by Parol, or by her acts, as entry and taking y profits —

Litt S. 2. 91. Co Litt 327. y 357. 8.

If an estate is limited to husband and wife, and a stranger, y husband and wife take but a moiety — here y husband and wife are regarded as one Grantee — This is in consequence of their Legal Unity —

2 Vern 120.

If real estate is conveyed to husband and wife by words, wh between strangers wd create a Pt Tenancy — they will take by entireties and not by moieties —
Estates in Pt Tenancy — P. 8. 5 — They are "Quasi Pt Tenancy."
3. Co 140 — 5 J R 654. 2 Ev. 38. Co Litt 187. a. b.

Ergo y husband cant by his own act, alien even a moiety or sever y Pt Interest — He cant thus deprive her of e chance

*

of taking y whole by Survivorship. They may dissolve it by joining in a Fine or common recovery – This rule stands on y same principle of y former –

The wife may convey lands limited to her on condition, or yt she wd convey from to another – 4 Bruce 9 21. Corn. 2. 33. P. 1. 9.
This is allowed to prevent forfeiture of her interest. The law dont allow her to convey away what she ought to seem retain, but wh she ought not retain, by y conveyance wh she ought not be injured – Post 31 – 40 – 1 –

And as Chy has allowed y wife to hold seperate property, she may now by her contracts, bind y property thus holden, 6 B.P.Cs 100.
even while living with y husband 1. Pow. 31. 90. 102. 1 Bes. 517.
1. Bro Ch 16. 2. N Ro. 162.

*This is an anomalous estate at C Law. The husband and wife take Quasi Pt Tenants –
For y husband has no right to it – no control over it –

29 – Yet she ant bound in yo case at Law, and her person 29.
of course, ant liable – Her seperate property only is bound 2. Bes 100.
in yo case, and yt only in Equity. For if she wd be subjected 2 Atks 370.
at Law, her person wd be liable to arrest, both under Mesne 1. B. Chy 16.
and Final Process, in wh case not only her own priveledge 1. Pow. 103.
but y rights of y husband might be violated – 1. Ve Pl 334. 2. P. Wm 144.
2. N Ro 162.

Whereas a Ct of Equity can work directly upon y property, without subjecting y Person –
and even tho y property is holden for her by Trustees, she may 1. Bes 517
dissolve it in Equity without their intervention, tho their 2. Bes 190
joining in y Conveyance is made necessary by y Instrument 1. Ford 153.
under wh she holds – For her equitable interest is independent
of yo and y husband has no concern with y Property, so 1 Pow 60. 61.
yt no right of his can be injured by y conveyance – 1. Bro Chy 17. 19. 20.

If y husband is banished or has abjured y Realm, or
2. Esp R 554 Esp Re. 554) or is transported or is an alien enemy, he is
557. "Civiliter mortuus" and y wife is considered as a Feme Sole,
Esp D. 127. for in such cases, there is no ratio reason for treating her
La Raymo 147. as a Feme Covert, or y Loss either of her own privileges or
1. Bos. & P. 357. y husband's right — Besides a capacity to act for herself
1. Ken. Rl 346 is deemed necessary to prevent her from suffering — In these
2. Bern. 104. cases therefore she may contract at C. Law, and is
Salk 116. 646. liable to be sued and arrested — For y same reason, she
2. A. & E. 231. may also sue alone —
1. Selwin 290. 300. 1 Pow. C. 75. 77. 1. Pow. 66.

30 — The rule has been holden to be y same, if y husband were
11. East 304 n. a foreigner, and has remained abroad for yrs without returning
2. Bos & P. 233
1. N R 80 For in such a case deserting y realm (it is said,) for yo
1 Bos. & P. 357. purpose, is equivalent to abjuring it and y wife, as in y
2. Esp. 554. 587. former case, is regarded as a Feme Sole — So in a case
of a divorce "a Mensa et Thoro" and for y same reason,
If husband and wife are separated under articles of
agreement, and y wife has a separate maintainance, she
she has been liable even at C. Law to y extent of her contracts.
1. T R. 5 — Salk 116 — 5. T R. 682. &
But y s doctrine is now overruled 8 T R 545.
Esp R. 6. 6. Bos. 607. 4 Bos. 766. 1. Ba. Chy 377. 2 Bl. R 1078. 1195.
2. N. R. 148. 163.

12. make any contract The case of Corbett vs Poplenets went further yn any other —
In Bennet vs Brooke, y wife alone was holden liable
at Law for necessaries, tho' the husband was within y realm
in yo case she was holden liable — She had a separate
maintenance — lived separate and y contract was for
necessaries — 1. Pow C. 79. 80. 100. Cooks Bankr. Law 24. 28.

In Lady Sandwich's case, y husband lived in Ireland
y wife in England. A Seperation by deed had taken place

and a seperate maintenance was secured. She was held liable on y ground, yt her husband lived abroad and yt she traded as a Feme Sole – 2 Br Chy 385. 87. 1. Pow C. 78. 2 P & D 120.

Indeed y Cs of Lady S. and Barnell vs Brook. 1. Bet P. 357. Corbet vs Poole have all been denied to be Law and must be considered as overruled – The whole current of Eng authority is vs ym – 8. T R. 545. Marshall vs Rathbone – 1. Selw 297. 11. East 301. 2 Bos. P. 226. 9 East 471.

(not Law Lanesborough, Barnwell and Brooks. Corbetts Polnette)

Nor is her seperate real property liable in Equity, ni by virtue of an agreement to yt effect on her part, Semble – 1st. an agreement respecting y property itself. not for her debts or Personal ~~representatives~~ engagements – 1. Ves. 517 – 1. Br Chy 16 – ~~20.21~~ 2. 11 R. 163 – But here seperate personal property and y rents and profits of her seperate real estate, may be applied by a Ct of Equity in discharge of her Per Personal engagements. ni in discharge of a hand note &c. 1. Br. Chy. 20.21 – and y decree is never personal vs her, it never acts in Personam but her property only – 1. Br Chy 21 –

In these cases of seperation and seperate maintenance, if a remedy is to be sought vs y wife, a Ct of Equity (as before said P. 28) 29 – is y proper Forum, for yt Ct can give a remedy vs her seperate property without infringing her privileges or y husband's right – 8. T R. 547. 1. Pow C 183

2. A Feme Covert, being seperate, without seperate property, was never holden liable on her contract either in Law or Equity. The husband is bound to support her, and to admit yt y wife is bound, is to exhonerate y Husband – 4. T R. 766. 6. Do 604. 5. Do. 682 –

It has once been held (aliter) yt y wife living seperate

from y husband, in a state of adultery, is liable on her own contracts (1. B et P 338) sed Quere ante 23-
For tho she may thus forfeit her own rights as between y husband and herself, she can't impair her husband's. In Judge Foulds opinion, yo ant Law-

2. Br Chy 356. 10. Co 1 Ton Bl 300 7. Co 8. 1. Pow. C 22.

If a Feme Covert alone levies a fine or suffers a recovery she is bound by it, tho y husband may defeat it during his life or afterwards, if Tenant be y Curtesy) by entry - 1. Plen Bl 341.
She is estopped by y recovery, tho some have doubted, an she cd bind herself by a recovery - 1. Ton Bl 300. Co Litt 326 - C. B

10. Co 43 1. Selwin 466. 1. Ch. R 43. 2 Role 395.

1. Pl Bl. 341 - and after husband's death, she is bound by y Warranty in y fine, he not having defeated it - If she cd be bound during coverture, y marital rights wd be infringed.
Tis matter of Record, and cant be averred against.

If y husband joins in a fine or recovery, tis binding on both "ab initio"
She is bound by way of Estoppel -

2. TR. 695. 1. 1. Pl Bl 341. Pow 150. 2. Ves Jr. 181. 610. 6 Br. P.C. 150.

There were regularly y only 2 conveyances by wh a Feme Covert cd alien her inheritance at C Law. But it seems now, yt she may do it. First By executing a power over a use at Law (2. T R 695) wh operates at Law as well as in Equity. 2d In Equity she clearly may, as well by a declaration of Trust, tho there is only an agreement made before marriage, for settling y Estate upon Trustees: subject to her appointment or declaration - The second mode can be enforced in Equity only - Pow. 2. 150. 155. 2. T R. 695.
1. Ves 181.

Pow 2. 150. 155. 2. Ves 180. 2. T R. 695. 6 Br P.C. 150. 163 4. 180 -

In y former case (if there there is an actual settlement made in Trust) y Trustees or persons, to whom y state was first conveyed, are compelled in Chy to carry her appointment or declaration - into effect, by joining in y necessary conveyance

for yt purpose –

In y latter case other necessary parties, as y husband. or y wife. heir at Law as y case may require. are compelled to y same thing

If y wife having seperate estate, permits y husband to receive and use y rents and profits, if it is real, or Interest if it is Personal, she is presumed in Equity to have abandoned y rents and to him – 2. P. Wms 82. 1 Atk 603. Pow. 422. 423

As to devising Personal property see 2 Str. 498 – n Pow. D. 167. 6. 2. Ves 191.

35. A Feme Covert cant devise real estate under General words "all and every persons or person" in St 32. Hen 8th This was y Rule before y explanatory Statute 34. Hen 8th (Ibid) and by yt Stat, she is expressly disqualified. This rule does indeed seems to be founded on y Presumption yt she acts by coercion of her husband – For she has no interest in her inheritance, and y Power of devising it, cd not subject her person, and of course cd not violate y marital right – Dyer 354. a Pow D. 140. 46. 1. Ves. 350 – 4. Co. 61. b Hob. 225 2. Wils 2. 2. East 556.

The Wife's Power to Devise –

By our St of Count, all persons of full age and right understanding & not otherwise legally incapacitated, shall have full Power to make their wills – Testaments, and other alienations of their lands and other Estates – Sts of Count –

As to y meaning of y words "legally capable" note y construction given to y words "all persons" in y St 32. Hen 8th Pow D. 141 – 12. persons capable of disposing of real property by other modes of conveyance –

It was once decided in y Ct of Errors in Connt, yt she might devise Real Estate under y Gen Law authorizing devises – but since determined Contra* Heb. 135. 438. 2. Say 162. Under our new St, she is expressly empowered to to devise (St Connt 15) And in General, she can't make a will or bequeath Personal Property – For it wd violate his rights – Office Exec. 136. Wentworth

* Kirby

infra *

2. Bl. 498. 2. East 552. Secus of Goods, wh she holds as Executrix, in "Auter Droit" i.e. she may make an ~~disposal~~ edescription of ym with husband's consent, but she can't even with his consent bequeath ym –, making an execution of ym, is no more yn executing a power over ym –

Godolphin 110. 11. 301.

In Equity, she may bequeath her Personal property holden to her sole and seperate use – She is a Feme Sole in Equity "Quo ad hoc" She can't do ys at C Law, for y C Law knows nothing of Property holden to her Sole and seperate use – Not being disabled as to yt by St 34 Hen 8th – ante 41.35

* 2. Bl. 488. 4 Co 51. 2. East 552. Str 831. Cro Jn. 376. 1. Mod 211.

It has been said, yt she may bequeath her Paraphernalia – 4. Reeves History Eng Law 72.3.4.

But she may bequeath any kind of Personal property held in her own right, in wh she has y beneficial interest – with his consent, but as y goods were originally his or hers, tis his conduct yt gives y conduct, his consent conduct is y operating, bequeathing act –

1. Sc Bl. 347. 1. Mod 211 3 Atks 695. 2 Pl. Com 82. 316 1 Bem 245. 2. Do 253. 1 Reeves His Eng Law 101. 111. 307. 4 Do 73.

That y husband's consent gives validity to y Instrument – 2. Bl. 488 – 1. Mod. 211 –

2. East 552. But his assent of a bequest ~~to~~ by her of Personal Property wh may accrue to her after his death, will be of no avail tho' she survives him, for he has no power over it, The bequest is ergo void 2. East 552. This proves, yt it is y assent of y husband makes her will of Personal property valid –

3
103. If a Feme Sole makes a will and post marries and dies before y husband, it is revoked. For it is essentially 1 incident to a will to be revocable by y act of y Party or Testator, But her power to do yt, being suspended by marriage, ("for y revocation during coverture wd be void") y Law revokes it for her, for y Law won't allow yt ambulatory Instrument to remain in force— 2. P. Wms 624. 4 Co 60- 2. T. Ra 685 2 Bl. 499-

But if She survive y husband, how is y rule? The opinions are contradictory - The weight seems to be in favour of y Reversal — I think it wd be revived, —
Ld Kenyon Cn. 2 T.R. 688. Moore 381- (2 T.R 685.)
2. Bl. 499-n- Pow. D. 173. "Devise" 135-

And a will made by a Feme Covert is not by y English Law validated by y husbands death, for if not good in its inception, it can never become so — Same rule as to all contracts 2. East 552. Collateral events can never give validity to yt wh was originally invalid — 1. Eq Ca 17/. 11. Mod. 123. Pow. 172.3. 2. East 552. T. Ult 246. Plow. 343. Salk 238.

one not coupled with an interest 35.

35. She may execute a naked authority, for here no interest of her's can be affected - as a bare power to sell another's property Com D. Bm. Feme P. 3. Co Litt 112. a. x. n. b. 4. Cruse D. 21. 235/.

So also tho' an interest passes to her with y power, provided y authority is collateral to y interest and don't flow from it - They are then unconnected, as if granted to different persons—

As devise to her, of an interest, in trust to convey to another, or on consideration of her conveying - Here she is bound to convey and by conveying parts with no interest wh she has a right to hold— Co Litt .12. a. n. b. Zach .139- 1. Bac L 192. 4 Cruise 235. .21.
Pl. 40. 41. of y s title. "Devise 40"

Aliter if y Power arises out of her Interest - as Devise to her in fee with power to convey - 1. Bet P. 192 - In

10. Ves. 246. ye case, if she cd execute ye power, she cd dispose of her own beneficial interest — Post 40. 44 — ante No. 1. P. 83 —

But I conclude, she may convey it in Equity, as seperate property, independently of ye power. (vt Supra) Post 38 —

4.. she may however execute a power or authority retained by herself to convey, or even virtually to devise her own estate — if ye estate is settled on her by way of Trust or Use —

in ye former case, she may effect ye obligation by declaring ye Trust, in ye latter by executing a power over ye Use —
If ye Trust or Power is to be created during coverture, it must be by fine; if before marriage it may be by deed —

as an estate of a woman conveyed to ye Use of herself for life, remainder to ye Use of such persons, as she by any writing in ye nature of a will shd appoint —

Here a limitation by her of ye Uses, in remainder, is valid in Phy — 1. Pow. Dev. 150 — 2. Ves. 191 — and Even at Law. Uses being now executed by ye Ct of Uses —

41 — So by way of Trust, she can dispose of her Real Property in a similar way. as an estate of a woman conveyed to Trustee in Trust for her seperate Use, coverture, and afterwards in Trust for such Person — In such or ye case an appointment by her in pursuance of ye Trust will be supported in Equity, as a declaration of ye Trust — IE. ye Trustees will be compelled to convey or carry it into effect —

And it seems, she can't devise or execute a power by devise over her Real Property, in either of these ways

For y rights of her heirs at Law are concerned –

She may in Equity bequeath her Personal property under a bare agreamt of y Husband before marriage, yt she may retain it. for yt is absolutly in his power
But y rule holds only in Equity, for they only can enforce y agreamt.

At Law she can't hold y property as seperate. ante No 1. P. 80. The agreamt in yr case makes it her seperate property.

But a power to convey by Deed, y property of another, she may execute with a use – Pow D. 312. Noy. 80 – Lach 11. 135. P. Vulk 239.) Tho she can't execute a power over her own interest. 1. Bet P. 192. For in y first case she is a mere agent for passing y others interest –
And y appointee in y above cases, is considered as taking by virtue of y Instrumt giving power, thro' y Person executing it. See Devises

First. She may dispose of her Real Property by executing a power over a use. Suppose a woman before marriage conveys S. her real estate to A. B – to y use of herself – for life, remainder to y use of any person or persons she shall by any ~~mean~~ writing in y form of y deed, or will, yc appoint – Here all she has to do, is. to make a will in form, appointing her children or any persons, y remaindermen – She reserves, while Sole, a Power to convey to whom she pleases –

When she makes y appointmt, y appointees are in remainder devises, but she doesn't in form convey y whole, or t[illegible] out of her, – nominally having reserved to herself only a life estate – and a power to appoint any person or persons to take y use in remainder – She exercises a power over a Fee simple wh she conveyed away while Feme Sole –

These appointees in yt case, take under y original settlement and not by y appointment, for yt is nothing more or less yn naming those who shall take it—
The appointment is valid at Law—

Second. Declaration of Trust. The main difference between ys and y former mode of conveyance, is, yt, y word "Trust" is substituted for "use" "Tis thus then, a woman before marriage conveys her Real Estate to Trustees in Trust for herself and seperate use during life, and y remainder in Trust to such persons, as she shall in y form of a will appoint. Now she may declare by writing in form of a will, who shall take. and these appointees as in y former case, take under y original Deed. wh she made when "Sui Juris" ante 35—

36 Agreements between husband and wife—

Tis a General Rule of Law. yt all contracts of husband and wife are void, and those made between ym before coverture dissolved by intermarriage— Co Litt 112.264. Cro Eh. 551. 1. Ch. C. 442. "Powers of Chy 5"

The reason assigned is, yt y legal existence of y wife is merged § 1 Ch. 444.2.. The true reason seems to be generally— First yt by their legal union, y right and obligation meet in y same person. Salk 326— So yt an action cant lie. 2d That a recovery if attained, wd in most cases be nugatory, by reason of y rights of y husband to wife's property— Thus. If he cd have a recovery vs her, it wd in general be out of wh is evidently his own, or what he might make his own. by his own acts— If she cd recover vs him, what she might recover, wd ipso facto, become either his absolutely or partially—

Besides Thirdly— The policy of y Law won't allow

suits between ym – Hence if ye wife of a defendant becomes Executrix or administrator to ye Pltff ye action is destroyed – 8. T R 407 –

If ye Def in yt case, had been taken in execution by ye original Pltff. he must be discharged. Ibid. For his wife as Executor has now become ye Creditor. but she cant hold him in execution, and besides ye Trust during coverture devolves upon him; so yt he himself has ye legal right of creditor, at his control – But there are some Exceptions to ye General Rule – Post – 8 T R 407.

37. Contracts of Husband and Wife during Coverture.

At C Law no contract between Husb. and Wife respecting Personal Property is valid, yo ye reason before assigned and indeed ye C Law dont recognize a right in ye Wife to hold Personal property independently of ye husband 1. T R 9. 1. H Bl. 336. 345. 6. Cooks Bankt. 35 1. Pow. 84. C.

And a deed of Land from ye husband to ye wife directly, wd at C Law and according to ye ancient Rule of Equity, be void – by reason not only of ye husband's right to her property of wh ye control and "mortuet" wd stile be in him, but by reason also of ye impossibility of any exercise remedy between ym! For ye Law knows of no right without a remedy – Besides ye C Law dont recognize ye separation of rights and interests between ym, wh a contract respecting property implies – Co Litt 3. a. n. 1. 112. 1. Pow. 84. 4 Co 23.

38. But tis now settled in Chy (vt ante No 1 P. 3 – 84) yt husband may settle property to ye Sole and separate use of his wife during coverture, even without Trustees – 1. Ambl. 3426 1. atks 270 – 2. P Wms 305 – and her agreements respecting yt property, even with ye husband, are binding –

For Equity can act upon and controle y property without invading y Personal relative rights of either party –
2. vis. 669 Por Chy – 44 – 2 Vern 64 – 1. atks 270 – 1. P Wms 126 – Browns Chy 16 – 1. Tonb. 90.1 – 112 – 2 Mass. 159 – 6. Bro P. C. 156 – 2 Ves. 131 note 1. Ve 163 – 517.
Pow D. 610 – 1. Day 221 – 35 (aliter) yt she cant hold Personal property to her seperate use –
But it how since been decided seem by ct of Errors – Pow. Chy 8 –

2. Vern 385. Formerly holden yt Trustees were necessary –
3 atks 72. Pow Ch. 9. Title Devise 51.
A Conveyance of Real property by Husband to 3d persons
2 Rob. 337 to y use of his wife, is good at C Law. For C Law regards
332.3. only y legal title and Equity wd carry y Uses into effect –
4. Co 29. Aliter Since y Sc of Uses – because y legal title vests
Co Litt 3. n 1. in y Cestui Que Use" so yt a conveyance for y use of
112. y Wife, wd be a conveyance to y wife, wh at Law, cant
1. Bost & P. 195.7. be –

30 – So if Husband to incourage y industry of y Wife, engages to allow her a part of y avails of it, y agreamt is good in Chy – 3 P Wm 33. 1. Ford 32. Contra 1. Day 291. overruled.

She may sue y husband in those cases by her next friend in Chy –

1. Atks 278. "Donatio causa mortis" from husband to wife is good at
Pow Chy 4946. Law – (Semble) For it is testamentary – 1. Co Litt 3. a. n. a.
2. Eq Ca 150. 2 St Co 163. 168. 1. Tonb. 87. 99 –

1. Ves Sr 334. 41. 51. If husband covenants with y wife not to intermedle
2. Pr Chy 377. with her estate, he is estopped from doing it and she is left to her contract. 12. she may obtain an injunction as him in Equity

40 – Articles of agreamt between husb. and wife to live seperate
8. Mod 22. are inforced both in Chy and at Law – 2. Vern 386. 671.
3 Por. 614. 2. Do 377. 1. Burr. 452. 1. Ves Sr. 334. 351. 1. Forill. 305.

of then in violation of y agreamt, he compels her to live with him again, she may be discharged by a Writ of Habeas Corpus — Com. D. Bar Tem. O. Str 478. 1. Burr 542.

For neither y person or property of y husband, is injured by a "Habeas Corpus" nor does it interfere with any marital right, wh he has not relinquished, and if post repeats y attempt, he is guilty of a contempt —

He is bound however only to y extent of y agreamt, ergo any property post coming to y wife, will be as much at his disposal, as if there had been no seperation — ni y contrary is expressly stipulated — Bac. Abr. D. 1. Bern. 261.

41. A Voluntary Settlement by husband on wife post coverture, is not good as even subsequent purchasers, knowing y fact, as being Fraudulent by St 27. Eliz —

Sure. is yt correct on principle? knowing y fact and being voluntary purchasers, how cd they be defrauded by y settlement, if established?. see F Conveyances —

Contracts between Husb: and Wife. before Coverture —

42. It is regularly true, yt if y husband is indebted to y wife, before coverture, or vice versa, intermarriage extinguishes y obligation see P. 36 — 1. Ab. 442. Cro Ch. 551.

If y husband being indebted to y wife by bond sealed, before marriage, dies, and leaves y bond uncancelled, y debt, it seems, will not revive, for a personal contract, once suspended, is forever extinguished — 2. Pow. 254 2. H Bl. 10. Hob. 10. Cro Ch. 551. 1. Ab. C 542. 4

If y Obligee in a bond, being a woman, marries any of y coobligors, y whole debt is discharged, and "e converso". 1. Ab 442. Cro Ch. 551. 1. Forbb. 23. Com. D. Ba. Ch.

The principle of yo Rule is yt y marriage is a discharge of all y debts, yt might have been due from y obligor, she marries – But y whole debt might have been due from him, ergo y whole debt is discharged –

Under y Gen Rule, a distinction is taken between a contract yt creates a duty during coverture, and one creating a duty after it had ceased – A Contract or Promise by y husband before marriage, to leave y intended wife a sum of money, after his death, is allowed to be good at Law as well as in Equity – Because there is no debt during coverture, for y contract is made before coverture and don't create an obligation till after – Here there is no difficulty about a remedy, or invasion of y marital rights –

Salk 325.6. 1. Lord 93. Cro E. 57. Hob 216.

Ld Holt was opposed to yo rule, but he was overruled by y other Judges and tis now well established –

43 Als to a bond executed by a man before coverture, conditioned to leave his intended wife a sum of money after his death, there has been much difference of opinion, an it ain't discharged at Law by their subsequent intermarriage – The Penalty being a present debt –

That such a bond is good in Chy, as ruled of Agreement, there has been no doubt – 2. P Wm 243. 2. Vern. 280. 490. 2. Vern. 343. 2. Atks 87. Pre Chy 237.

And such a bond was holden good in Ld Holt's time, Holt himself contra, tho' overruled by y other Judges

Carth 571. Com Ro. 67. or 57.

The great great weight of Ld Holt's opinion rendered y Rule extremely uncertain, till Ld Hardwicke's time – 5 TR. 382. then it was unanimously settled by all y Judges, tis now good at Law – Cathery 54.

5 TR 383. 2. P Wm 243

4. A wife may by accepting a Jointure before marriage

bar her right of Dower 1t. at Law. Such an agreement, was never considered as extinguished by subsequent intermarriage — Co Litt 36. 4 Co 1. 2. 2. Bl. 137. 8. 1. Bulls. 173.

For y estate don't take effect, 'till after y ~~contingency~~ coverture is determined. And to enforce y contract either in Law or Equity, requires no Suit between husb and wife —

The Eng. Law. as to Barring Dower by Jointure, is regulated by y St of Uses — 27. Hen 8th

Requisites of Jointure to Bar Dower —

These are Four.
First. It must take effect immediately on husbands death —
Second. It must be for y life of y Wife — at least and not per auter vie —
Third. It must be settled expressly on y wife ~~to~~ herself — and not in Trust for — Fourth. It must be expressed to be in satisfaction of her whole Dower — In ye subject — there is a contrariety of opinion — but I think y weight of authority is in favour of y Rule and have laid down — and yt y fact may be averred Co Litt 36. B. 2. Bl. 135 Contra 4. Co 3. a. 2 Bl. 138. n. Owen 33 —

Unless these requisites are complied with, in settling y Jointure, y right of y Wife to Dower ain't barred — Tho still y Jointure is not void, but nihil ym, it will not bar Dower —

45. It has been doubted, an a Jointure in Connt, may not consist of Personal Property (ante 3) Quere. "Some other estate" must mean (in our St) a larger estate yn for life — St Connt 147. R. That it can't. See Tarpeia. Co 1800 — Sellick vs Sellick —

1. Ves 55. 1. Pow. 53. 5 Bro P Cs 370. 2. Eq Ca Ab 101. 2.

But an executory agreemt by wife before marriage to accept personal property or money in lieu of dower may be enforced in Equity — the Chy can decree upon its adequateness and reasonableness so as to guard her as loss or injury, and wont interpose to her injustice — Parent and Child 41 —

If a Jointure be settled after y marriage she may on husband death, accept or refuse it and take Dower. For y settlemt being made during coverture, doesnt bind her. But she cant have both 2. Bl. 138. 2. Bl 140. 1. Bulst. 13. Eyre 808 —

And by accepting a Mil or Dower she waives y Jointure —

3 Co 27. a 4 Do. 5. B.

a Devise of Real Property.

46. Parol Evi of Testators intention yt it shd be instead of Dower, is inadmissible — Nice decided Contra by Ld Somers — but his decree was reversed by Wright and Wrights decree was affirmed

4. Co. 4. 5. Cro Elvi 128. Co Litt 36. B. Ld Ray 483.

For in devises, y testators intention must be collected from y face of y Instrument —

But wh y devise ant. expressed to be in Bar of Dower, yet y wife cant take both — If y husband has devised away all his other property. (Vent 6) This being Proof upon y face of y Instrument, of his intending y devise as a substitute for Dower —

Ld Ray 438. Cro Elvi 128.

Tis now a General Rule, yt marriage settlemts, agreemts made between husband and wife before marriage, are binding in Chy — 12 on husband and wife, both of him —

1. Pow 444. 2 Do 255. 2 Cem 480. 93. 1 Scull 87. 93. 95. 2. atk 97.

Husbands right and power over y Person of his Wife —

4. If y wife is injured in her person, and y husband sustains a Consequential damage, he has a sole right of action vs y wrongdoer — as by Battery. False Imprisonment. Slander —

Salk 206 1 Ser 160 Com. D. Ba Tom W.

The action must be laid in ys case, with a "Per Quod Consortium amisit" Ibid 2. Chy Ps 3, 4 — 1. Salir 345. Cro J 501. Cro Ch 88.

"or Consortium

So for "Crim Con" with y wife, y husband has his action. 4 Burr 2057.
Doug 162. Bule N R 27. 3.

The precedents of ys action are laid in Trespass. 2 Chy Pl 265 –
Tis however in effect an action on y Case – Ibid – 2. Ch Plead 374. 265.
6 East 387, 9 – This is clearly a departure from principle,
a usage arising from inadvertance

Proof of Lawful and actual marriage is necessary in ys action –
A marriage "De facto" gives y party no right to action
for there is no legal injury –

If y husband consents to y act, he can't maintain y action,
"volenti non fit Injuria". 4 T R. 651. 1. Selw. 13. to 15

So if he himself lives in a state of open concubinency –
1 Selw. 15. 4. Esp. 16 – Jac. Law D. Bar. Forms 50 – (Contra
and yt it only mitigates damages – 1. Selw. 15. n
This is now y settled rule and the third y true one –
1. Esp 57. 1 Phill Ev 39. n

It has been holden, yt y husband cannot maintain an 505
action for adultery, committed with his wife post seperation –
by agreement – 5 T R. 357. But ys case seems to be doubted –
for any Issue post born, is prima facie legitimate, and
y vinculum matrimonii ain't dissolved – and it is no
policy to establish any Rule yt wd bar their reconciliation –
6 East 244. 1. Selw. 16.

If y wife is allowed by y husband to live as a prostitute,
he can't recover –
If y husband is not privy to it, it generally goes
in mitigation of damages – Bule N P 27. Peak 28. 1 Selw. 15. Tess and n

But husband's mere neglect or inattention as to wife's
conduct, goes only in mitigation of damages – for ys don't
amount to consent – 4 T R 651. 1. Selw. 15.

In aggravation, Pltf may prove her rank, yt her character was before good — that they lived together harmoniously, no any peculiar turbitude in Def's conduct — 12. Selwyn 300 — Bac. 27 — Esp 343.) In mitigation, Def may prove Pltfs unkindness, his having turned her away — having refused to maintain her — her bad character before y act — her previous elopement, her wanton manners, her having made y first advances — her prior incontinency, even before marriage — quia in these sort of actions, y damages are presumptive.

breach of hospitality

Phill Ev 140. 657. Bull. 27. 1. Selwyn 30. 31. 4. Esp 16. 2. Do. 562.

But he can't give Evi of her misconduct after y act —

According to ancient C Law — the husband might give y. wife moderate correction. 1 Bac. 185. 1. Lev 113 — 6 — 1. Hawkins 30 — 1. Bl. 444 — 471. — This was allowed on y ground of his liability for her misbehaviour — But according even to y old Law, as well as y present rule, if he beat her violently or even threatned to do it — she ed bind him to y peace by writ of "Supplicavit" in Chy — or might obtain a divorce in y Spiritual Ct propter, propter sævitiam — 5 Mod 22. more 874 1. Bac. 285

articles of peace are now exhibited at Law.

no evidence allowed now (semble) If y husband beat y wife, she may bind him to y peace and vice versa —

1. Bl C. 445. 1. Bro Chy 445. 1. Selwyn 113. 3 Bl 433. 2. Lev. 128.

It seems to be agreed yt he may restrain her of her liberty for grosse misdemeanors, as keeping bad company —

The husband's power over y wife was first impaired in y reign of Ch. 2d —
That he may restrain her for keeping bad company and destroying his property — see S. 478 — Com. Dig. Det Home. 0 —

1. Burr 634. Str 478.

But in case of unreasonable confinement, she may be released by "Habeas Corpus" — by her next friend or any one who will volunteer in yt character.

He may justify battery in defence of his wife and vice versa —
Esp D. 314. 18. Co L. 239. Ld Ray 62. Ball 18.
Each may thus justify as in self defence —

* If he reconfine her unreasonably, he will be guilty of a contempt —
It was held. (aliter) by a late Eng Judge, yt y husband might correct y wife with a stick as large as y thumb — Hence he obtained y name of y Thumb Judge —

Evidence

52. The mutual inability of y husband and Wife to testify for or against each other — Evi 141 — Co Litt 6. B.
1. Bl. 443. 2. Hawkins 31. 4 TR. 678.

It is a general rule, yt y husband and wife can't testify for or vs each other. The reason assigned is, yt y husband and wife are one person and no one is allowed to testify for himself — or for himself more properly —
The union of Interest and y policy of y Law, seem to be y true foundation of y Rule —
Their common interest prevents ym from testifying for, and y policy of y Law, vs each other 1. McNally 162. 168. 170. Pea. Evi 173 1. 5.
Esp D. 720. 1. Phil Evi 63. 64. Bule 286. 1. Bl 443. n.

The husband can't testify when y wife is concerned even vs his own interest — As property settled to wife's sole and separate use, was taken for y husband's debts — Action vs y Sheriff, and husband excluded to prove, yt it was to her sole and separate use — 4 TR. 678 2. N. R. 331. Esp D. 720. Phil Evi 64.

If an action is brot by or vs y husband, or by and vs y Husband and wife Joinly, y declarations of y wife ant Evi vs him — As assumpsit by husband for wages earned by y wife — her acknowledgement of y payment is no Evi. Phil Evi 64 — Willis 377. 1. T R. 686 — Bule 28) So in Trespass vs husband and wife, her confessions of y Trespass committed by herself — can't be given in Evi — Str 1094. 1. Phil 64. 7. TR. 12.

in action of adultery with Pltfs wife, her letters to Def are not Evi vs y husband, nor her confessions of y act for him, being declarations made in his presence —

53 — Neither of ym is allowed in any case, even between y Parties, to give Evi tending to criminate y other. As when in Settlement cases, or Otherwise, if y marriage of y husband is disputed on y ground of a former subsisting marriage of y husband, y lawful wife. I.E. y first one, is not allowed to testify to y former marriage, tho' y husband ain't a party to y Suit — for they wd charge y husband with Bigamy — here policy governs —

Peo Evi 174. 75. 1. Phill 66. 4 Pb. 163. 2. T.R. 263. 2 La Ray 752. Esp L. 720.

2. T.R. 263. 1. Phill 67.

It has also been laid down yt if a witness has been examined as to fact, wh in its nature must have been known to him, (as his own marriages) his wife can't be called by y same party to contradict him, as it might subject him to a charge of Perjury — (Tho' y other party may)

Mr. Gould. don't regard as Law., it don't follow, yt contradictory evi charges y other with perjury. and he don't believe yt ys is regarded as Law in Eng —

Peo Evi 174 appx 44 6. East 192 1 Phill 66

And a woman divorced "a vinculo matrimonii" can't be a witness vs her former husband to prove any fact — wh happened during y coverture — For it might tend to unhair y confidence of husband and wife during coverture —

But She is a competent witness as to facts wh took place subsequent to y divorce — Ibid —

If one testify in Chief he may be cross-examined.

Tis a Gen Rule of Evi yt a person may testify vs himself — and with consent of y opposite party for himself — But ys ain't so in case of Husb and wife, even if Pltf who allows Def wife to testify for her husband, for she might

2 Litt 6. B. Peo. Evi 175. Raymd. 12. Harwood Cs 264.

testify to facts, without intending it, wh wd tend to criminate him –

And if a Married woman brings an action as Feme Sole – her husband can't testify for Def to prove her a Feme Phil 64.
Covert, as y proof of yt fact wd defeat her Suit – 2. TR 265.9.
Poa Evi 176.

I G. I doubt it –

Exceptions to the First General Rule.

First In y case of Treason, it is said, yt y wife may testify vs y husband, y duty of allegiance being paramount to every private obligation – Bule N P 286.89. Rayma. 1. Gilb Ev 119. 1. Hale's Pl Cr. 48.
2 Heb 403. Contra 1. Hale 301. 2 Hawkins 608.
But yo has been doubted and I think properly – Peak 173.
1. Phil 68. 69.

54. Second. When wife exhibits complaints vs y husband to bind him St 633.
to y peace, for illtreatment of herself, she may testify vs him Ray 1.
and Converso – 1. Bl. 443. Pea Evi 173. 2. Hawkins 432. Bule N P 287.
This is allowed from supposed necessity – Esp D. 721. 1. Burr 542.
1. Phil 68.

Third. When husband is prosecuted by a public or a private
y wife as accuser – 1 E. by Indictment –

This rule is denied or doubted – Rayma. 1. 1. Salk 181 – Gilb
20 – Recognized. 1. St 633 – Hall 115 116 – Bull 287 – 2. Hawkins 308 – 308.
Esp. 721 – Peak 173 – 1. Bl. 443 – n – 1. Hale P.C. 301 – 1 Phil 68. 68 308.
It seems wrong to repose, in well established rules 1. East, P.C.
454. and agreable to reason – It seems a necessary Rule –
The weight of authority is in favour of it – Contra Ray 1. Gilb 120. 1 Mc Na
57.

She cant testify vs husband in case of Com Assaulting – or ~~Fourth.~~
murder – But she can on an information vs y husband, for attempting
to take away y life by force after articles of Seperation –
Bull 287. 1. Burr 543. 1. Phil 68.

Fourth. A woman forcibly carried away and married — 1. Phil 67. 8.
yet 3. Henry 7th is a witness vs. y husband to prove y fact — Cro Ch. 488. Esp D. 721. Bull 286. Peak Evi 174. 2 Hawk 008.
Here however, there is no marriage in law — such a transaction is illegal and made Felony by y St — 1. Bl. 443. 470.

The case is not therefore strictly in exception to y gen Rule — and y woman) it has been resolved) may testify for him — 12. to show yt y elopement and marriage was voluntary — on here part — 1 Phil Evi 68. n — 1. Mc Nally 181 — 2 — yt supposes her his lawful wife and if so. y wife testifies for y husband 12. in case she testifies yt y marriage was voluntary necessary — This rule prevents a strange Dilemma —

Fifth — If a man marries having a former wife living — y second may testify against him, tho y first cant — This (y second) is no legal marriage Bull N P. 287. Esp 721 — Peak 174 — 1 Phil 68 — 1. Mc Nally n. 181 — as in an indictment for bigamy, y first marriage being admitted and proved, by others, y second wife may testify to her marriage —

Sixth — In actions between other Parties, y wife has been admitted to give such Evi, as wd indirectly charge y husband in "civiliter" not "Criminaliter" — as in an action for wedding cloathes — w a man, his wife's mother was allowed to swear, yt they were procured on credit — y her own husband — 1. Str 504 — Bull Nisi P. 287 — Esp 721 — For her testimony in not Evi vs y husband —

Seventh, when y Evi wd lead even collaterally to criminate husband —

Thus in an Indictment vs B. y wife of A. ~~B~~ cant testify yt ~~A~~ her husband committed y offence — in indictment vs A.

1. Mc Nally 182. 1. 2. LRo. 268. 1. Mc Nally 168-9.
7 La Ray 162. 1. Bl 443. n.

Nor can she testify where y Evi wd operate indirectly in his favour – As an Indictment for conspiracy, y wife of one of y Defts can't testify for y others – For in Conspiracy – (P) y others are all acquitted, one can't be convicted –
2. Str 1090. Pa Evi 173. 5. Esp. 137. Phill Evi 65. 6. 1. McNally 152. 3.
1. McNally 172. 3.

57. Seventh – Declarations of y wife as to transactions immediately within her province, have been allowed to be proved, to charge y husband "civiliter" w. Declarations, yt She had agreed to pay a certain sum for nursing a child –
1. Phillips 71. 1. Str 504. 27. Esp D. 121. Bule N.P. 287.

56 –

This is somewhat anomalous – Her declarations appear to have been considered, as those of an agent, but y Rule goes beyond yt – in y case of common agents – Where y wife acts as Agent for y husband, as representative are Evi vs him as those of any other agent – Evi 21 –

Judge Gould, thinks yo Rule clearly a departure from principle – he wd also observe, yt y declarations of y Agent are no Evi in they are made at y time of y act done – any made post are not admitted – This Rule admitting y wife's decl. he considers as a departure from y principles applicable to y several general laws of Evi – respecting agents – and y principles as well as y particular rules of Evi, wh obtains between husband and wife –

1. Esp R. 142
2. Do 511. n
1. Camb 334
1. Phill 63.

Eight She dying declarations of y wife are good Evi vs y husband in an action brot – She is supposed to be under obligations equally solemn as those of an oath – 12. on indictment vs husband are good Evi vs him –
2. Leon 363 / 1. East Pl Cr 57.

Stile Evi 18.

In what Cases. husband and Wife shd Join in bringing actions and in what Cases, husb. may or must Sue alone –

In some cases, where y cause of action relates to y wife or her rights, y husband must Join with her as Pltf – In others, he may or may not, as he pleases, and in others he cannot –

Tis difficult to reconcile all ye cases either to principle or to each other — 1. Wils 423-4. 3

First Gen Rule — The wife must join as Pltf where ye right of action wd survive to herself on husbands death — 3 T R 631. 1 Role 347. 1. Wils 424. Bac 304. 1 Saund 309.

Because if ye husband might sue alone, he wd by commencing ye action, attach a Sole right of Recovery* — but also because she can't constitute an Attorney — Besides as Judgmt might go vs her, ye marital right be violated —

The following right to be attached to ye Rule marked* in himself and thus (as ye case may be) oust ye wife of her legal privileges 1E. her right of Survivorship — &c

In actions Real for wifes land, they must join, or ye right of action wd survive to her — She can't sue alone, not only because of ye husband's right to ye avails of recovery — but &c. as above* 1. Buls. 21. 1. Role 347.

So in Ejectment to recover wifes lands. (at Comm) Tho her terms survive to her — 1. Buls 21. Cro Eliz 33. Esp D. 454.

So in suits for ye wife's chose in action, wh she had before marriage — 1. Role 347. 53 — Cro E. 557 — 3 T R 631 — 2. Atks 208 — Mod 422 — 2. Wils 423 — 1. Selw. n. P. 303 — 1. Role 347. 2. 2. Ves. 566 — Com. B et F b. B et F. b. Bac E. Bar Sum

Contra, and* yt husband may sue alone in Poss ye wife — (but yt seems not Law) Cro Eli 133 — Esp 219 — 3 Lev. 403 — 7. T R. 342 — argument — Contra 1. Vern 396 — 10. Ves Jn 578 — Quere do ye authorities Contra regard a suit by husband alone — as a reducing ym to possession or an appropriation of ym to his own use? If not, they surely ought to be joined — The principle being admitted, as it undoubtedly is, yt ye wife's right of action for

Choses in action, wife survive to her - I think, y principle clear. yt they must join - This question is now considered doubtful in Westminster hall -

So to recover rent due to y wife while Sole -
Com D. B. F. R. Co Ldt 55. B. - 1 Role 378. Cro Eliz 700 1. Selw 25.
Quere. since y St 32. Hen 8th as yt St makes it y husband absolutely 1 Ro Com D. Bar Sem D or B.

So upon promise made to y wife while Sole -

For Torts done to y Wife while Sole, she must be made a Co Plf - 1. Selw. 304. 306. 2. Ld Ray 1208. 1 Sel. 38. Cro J. 511. 38. 600.
Com. D. Bar Sem T or B or D.

So for injuries to y wife during coverture - W Flanden - Asst and Battery - (Right survives - 1. T R. 62)
Com D. B Sem D. 1 Selwin 301.

So for waste committed on y wifes land and for y same - Mad Dr.

So in Trespass for cutting wifes trees during Coverture - Trees are a part of y Inheritance and y right of action survives to her -

Contra - yt y husband may join y wife or sue alone - Quere. his authorities dont support y position The case in Cro Eliz was for corn and yt in ventris may have been of y same kind - Note Com. D. B Sem. L. 1. Rolle 347. 6. 2. Wils 424 Cro Eliz 90.

Action for destroying emblems on y wife's land - (as corn, garden vegitables) dont survive to y wife, but y husband (it is said) may sue alone or join y wife - Cro Eliz 133 - 2. Vent 195 - Quere on what principle can she be joined - ? P G - Kinly, they can't join - Emblems are y fruits of annual labour - Bunbury.

59. Cro Eliz 96. So they may join in Trespass or destroying his Grass or injuring it, on her inheritance during Coverture — Are they not bound to join, as y action was survive to her? 2. Wils 424. Com D. T Fem. D or B.B. Bunbury 277.

In Trover for wifes property, if y conversion was before coverture, she must be Joined. 3 T Re. 631 — For her rights at y time y marriage. — on y action ante Nº. P. 77 — & Lak. y rule to bear upon y question an or no y wife must Join in action on Choses in action and to decide affirmatively.

So in General for injuries done to her person or property while Sole — 1. Bac. 306

If y property of y wife is bailed or found before coverture — 1. No. P. 77. and converted afterwards, the Husband and wife (decisions 3. TR 631. may Join in Trover — or they may sue alone — 1. Bac 289 — Salk 114 — Com. D. 474 — 1. Vent 261 — 1. Lev 107. 1. Sid 102) Court devided — by two Judges, y wife ought to be Joined — Selwin What propriety can there be in Joining y wife. — Her right at y time of marriage is not a right in action — She is constructively in Possession —

60. In Trover by husband and wife, y conversion shd be laid to husband damage only —

In the 2. Class of Cs. he may sue alone or Join y Wife — at his election —

Cro Car 443. Com. D. B. F. X Moore 422 564. Bac. 304 If y husband distrain for rent due to y wife, while Sole, and a rescue is made, he may sue alone for y Rescue — or Join y wife — He may consider y Rescue as a tort to himself only — as y goods distrained, were in his possession — or he may treat y proceeding throughout, as y means of enforcing her right of action — ante Nº. P. 83 —

No 4 - So in debt or covenant for rent accruing out of y wifes land during coverture - Palm 205 - Com. B et H - & The rent as said to survive to her - 1 Rol 350.
Com D. B Fem. O. Amb 692. 4 Co 51. Co Litt 162. B.

61 - The reason probably is, yt as y claim accrues during Coverture - he is considered as having a right to assent to her interest in it - and to dissent and treat it as his own - Sed Quere - is ys correct on principle? P.G. - thinks she ought to be joined -

If a bond is given to husband and wife during coverture - he may sue alone or join y wife - 2 Mod 217 - 1. Str 230 - 4 T R. 616 - 1. Selw 309 - 1. Bac. 305 - Esp 296 - 2 Bes 676 - 7. Com. B et H & & 1. East 296 - 432.3 - Esp 205 -
In ys case y above reason appears to be properly applied - 1E. yt he may consider it absolutely his, or may assent to her interest - If he shd not disagree to her interest - it wd on his death, survive to her - But if he shd not assent to her interest, y whole wd vest in him and no right wd survive to her (Semble)

Suppose y husband makes no election either way - y right donts survive to her - She takes no right in it any way - 1. East 432. 3 Esp. 205.
The modern opinions are, yt when a bond is thus given to husband and wife, is given Prima Facie - to y husband alone - and if after his death, she claims any right as Obligee - "y thus prima facie lies upon her"

So if a bond is given to husband and wife in her right as Executrix. 4. T.R. 616 - he may sue alone or join y wife - and yet ys bond wd survive to y wife - P conclude - Here we must search for an additional reason, wh P take

to be yo – y husband has a free control of y effects – he is liable for y execution of his wifes right of Executorship – he is liable for his wifes Trust and he may declare as on a bond to himself only – Ibid

62 – So in a ^ quere action for an estate accruing to y wife as reversion in fee during coverture, husband may sue alone or Join y wife – But in yo case, he must declare on a Trover in Fee – in himself and wife, in right of his wife – Seems ill on Special Demurrer.

2. Mod 217. So if a bond or other obligation be given to a wife alone during coverture, husband may sue alone or join y wife –
2. Ves 676. 1. Rol. Con. D. Bar Sem. Ar. & 3 Lev 403. 1. Vern. 395. 20.32.
It is y principle is, y husband has a right to treat yo bond y same as any other personal chattel given to y wife during coverture – So if a carriage be given her, it becomes absolutely his, by operation of Law. Yet y husband may give his assent to y wifes interest in y bond, or treat it absolutely as his own –

Wd yo bond survive to her, if he shd not disagree to her interest in it? So Ld Hardwick expressly says – 2. Ves. 676.7 – Semble Contra. 1 East 432. & 3 Cok 266 – and yt it vests originally in y husband alone, in he manifests an assent to her taking an interest in it – Dont y fact yt he may sue alone? prove yo position? P.G thinks – Ld Hardwick wrong, in y husband assents to y wifes taking an interest – When a chose in action wd survive to y wife, she regularly must Join – I think, y Criticism in Vesy and East – Correct –

1. Lev 403. If a legacy is given to wife during coverture, husband may sue alone for it – Com. D. 3. Ferral. Mod 173. 2. Rol 134.

That it does survive — See 2. Ves 676.

Cr. — Contra 3 Esp 260. 1 East 432 4. 5 T R. 692. Rob. H.C. 287. 8. a.

On y Question of Survivorship, y case will stand. Thus — If y husband has not assented to her taking an interest in it, it will go to his representatives — If he has assented to her interest, it will survive to her —

So of a share under y St of distribution — 2. Com Ro. 564 —

68 If y husband is obliged to resort to a Ct of Equity to recover y legacy, yt Ct, as y case may be" won't interpose in his favour w upon y condition of his making a settlement or provision for her. Equity' interposition being discretionary —

Roper 37. 233. Pre Chy 548. Litte xs and administrators 88 Atk 431. 510. 2 Do 420
2. Pr Chy 663. 3 Do 565 5. T R. 692. 3 Ves Jn. 512. 3 P Wms 12. 2 Do. 638.

And now she may maintain a Bill in Chy vs y husband — and Executor for a provision out of y Legacy — vs y husband and administrator for a proportion out of y distributive share, accruing w her under y St of distributions — 5 Ves Jn. 737. 317. Litte. Xs and admr 88. Toller 321. 4 90. 2. Do 676. 10 Do. 578.

But he may also join y wife as in y last case — 1. H. P. C. 88 — By doing yt he affirms her interest in y legacy —

Bardis. 75. 249. 4. Mod 155. Salk 114 — 2 Wils 424 — Cro E. 77 — 265. Com D. L. X. 2 Ves 251 — 2 Sid 128 — Cro Eliz 61 — Cro E 644 —

If y wife is y meritorious cause of action and an express promise is made to her, she may join in y action, tho' y cause of action don't survive to her — As promise in consid of her services — If y husband may sue alone Ord, in Eq v. it is said — yt y cause of action survives in yt action case to y wife — This is a mistake denied — Salk 114 — 1. H. P. Com. L. The true reason is yt y husband affirms y promise to y wife by joining her — Cro E 61 — Salk 114 — 2. H. P. C. 1238 — & G. he thus implied by agreement, yt wife may take y benefit of — There is an implied Do

12. any contract

64 – Husband and wife can't join in assumsit without stating
B N Priv wifes interest – 2. B Rc. 1236) as in last cases, viz –
2 N R 405 53 yt y service was done by and promise was made to her –
Cro J. 644. seems not correct – Post 68 – For no reason appear
for joining wife.

When Husband must sue alone. or Cannot join –

Third. Where y wife is y suffering cause of action, and y
husband sues for consequential damages, she can't be joined
Salk 206. in y action, as in case of Slander of y wife with special
Cro. Ch. 83. damages laid to y husband – For no interest of y wife
1. Lev. 140.
1. Ab 791. is involved in y Suit. The declaration must always
2 Bo. 387. be laid with a "Per quod servitium amisit"
Cro Jac 501. 38. consortium

So in y case of assault and Battery of y wife per quod &c –

65. The latter has been gen called Trespass vi et armis –
2. Bos & Pul Esp 645: But it is strictly case on principle – 2 JB 16.
4. 6. 6 East 387. 5 Co. 36 b.
2 mils 136.
319. 1 Selw 3.11.13

It seems however yt y action of Trespass is y approved
remedy Bat P. 476 – This is in consequence of Precedents
at variance with principle –

If battery is committed on Husband and Wife, they can't
join for y whole injury – for y wife's battery – they can
and must – for y husband's they cant –
For y battery to y husband is an Injury to him only –
Cro. J. 50 Cro E. 355. 501. 538. Selverton v. Conn. Cro Eliz 8. y –

But if in y case, seperate damages are given for y battery
& cash, y husband may release as to his battery, and then,
it being after Judgment, he may have judgment with y
wife for her battery. 2. Vent 29. Com D. B Serj y.
Hardr 100. Cro J. 655

so if as to y Husband, y Def is found not guilty, a verdict as him quoad y battery of y Wife is good — 2. Vent 23. Hardres 166. Cro J. 555.

56. The husband must sue alone on promises in consideration of forbearance to say a debt due to y wife while sole. 1. Com 52 — Salk 17. Carth 462. Cro J. 102. or due to her as Executrix Salk 107 Carth 462. For y right created by y promise is his, as y forbearance is his — For y wife cant legally act in y case — 2 — by ey . v of ...

So for adultery with y Wife — For y Injury is to y husband —

57. A declaration in Trespass by husband alone for breaking and entering y house and beating his wife tho' without a "Per quod" } is good — Beating y wife is only aggravation — Str 61. Esp D. 407.

On y other hand, a declaration by husband and wife — for imprisoning y wife "per quod", y husband's business remained undone to their damage — is holden good after verdict, y Per quod being then considered as only aggravation — Upon Demurrer, it wd be regarded as a misjoinder of y wife — Salk 119. 6 Mod 127. 1 Bac. 306.

But regularly, if y husband sues alone, when he ought to join y wife, or joins her when he ought to sue alone — y mistake is not cured by verdict — Judgmt may be arrested or writ of error brot: — 2. Bl. R 1236. 1 Wms 328. Str 61. 229. Cro Eliz 123.

Seen in y last case only, because y allegation stating a Sole interest in y husband is regarded as an aggravation —

But if y wife sue alone, when she ought to joined with y husband, Def can plead in abatement only — 3 Ld Ray. 82. 5 Com 133 — Sutton 1641 — For y action is not to the action, but to her disability, and it dont appear in y declaration — 1 Saund 6 n. 1.

1. Doc 307. But if her coverture is not so pleaded, and Judgmt goes as y wife, y husband may reverse it by Writ of Error in y name & both — Mirram — cbis —
1. Doc 307. 4 Bro P.C. — For his right might be affected by it —

c. 8. If husband and wife join in an action, and y declaration shows no interest in y wife, this is on Special Demurrer — and (it seems) on Gen Demurrer — 2. R.P.C. 405. ante 64 — But it is aided by verdict — 1. Salk. n. P. 311. 12. — 2. R 407 — 8. n. — For as y interest may be joint, y Ct where y Contrary does not appear, will after verdict presume so — Cont Trc P. 664 — 644 — overruled —

In what Case, the Husband must be sued with & in what without the Wife — as Defs —

1. Bl. C. 443. 3 Mod 186. 1. Roll. 351. 1. T.R. 348. 1. Salk. 281. 440.

First. Gen Rule — The wife must be joined with y husband, as Def, when y action wd survive to her — Secus y husband's representatives might be injured — This rule is y Converse of y Gen Rule, as to their joining as Pltffs —
Cro Ch. 366. Co Litt 351.

If y Pltff cd rightfully commence an action vs y husband, alone, and he shd die, y liability of y husband's representatives wd continue and thus y husband wd be subjected contrary to rule of Law —

So, in actions Real to recover lands holden as husband,

and so in all Real actions Com. Dig B. F. 4.

So for Torts committed before Coverture ante 11. 14. Co Litt 333. 57. 3 B. Com. D. B. F. 4

So for Rent due from her before Coverture. Co Litt 351. 3 B. Com D. B. F. 4.

So in general in all actions in wh ye wife was liable before Coverture. 1. Bac. 307. Ibid. Supra.

So of Torts committed by her alone without ye husbands privity during Coverture. She is ye only guilty Person and ye Cause of action wd survive vs her Cro Ch. 301. 1 Mil 149.

If a Lease is made to Husband and wife during Coverture, she must be joined in an action for rent accruing during coverture, because ye Rent follows ye interest and ye interest will survive to her: for it should be recollected, yt where a chattel Real is given to ye Husband and ye wife, they are Ye Tenants and ye chattel goes to ye Survivor. The Lease is not voidable, till Coverture ceases, for her purchases are only voidable, and yt only after Coverture B. Ps. 38. 47. Com. D. B. F. 4. 2 Str 1337. 1 Rolle 6. Com D. B. F. 4. 1 Rolle 348. 1 Bac 307.

Second: But regularly when ye cause of action would not survive to ye wife, she cannot be joined. as if a Feme Sole being a Lessee marries, ye husband must be sued alone, for rent incurred during Coverture. For it survives vs ye Husband and not vs ye wife. Ld Ray. 6. Com. D. B. F. 4. Raym^d 6. For she cannot dispose of ye Lease after marriage and ye husband takes ye whole benefit of during coverture "Pure Mantle" Raym 6. Com D. B. F. 4.

This Rule might seem to contradict ye Rule on ye last page, but ye lease in yt case was made to ye wife during Coverture and yt engagement of ye wife is binding on her during Coverture, tho she may avoid it after Coverture has ceased but in this respect they

Rule is very different, for here she enters on no contract during Coverture.

To. Assumpsit on ye Promise of ye Husband and Wife &c. It promise is bad. in this case ye husband must be sued alone.

If a battery or other Tort is committed by Husband and Wife jointly or by her alone, thro his Coercion, or by her alone in his company, they cannot be joined in an action, but ye husband must be sued alone, for in all these Cases, ye Tort must be considered as his sole act. "Page 14." 1 Rolle 348. Palmer 343. Com. D. B.F. G Pleads. 2. a. 2. Cro Ch. 355. or 401. 184. or 255. 4.

If ye decl^n then alledges, yt ye Tort was committed by Husband and Wife, ye decl^n is bad - incurably ill. even if ye husband is found not Guilty. For the Pltf declares as for a Tort. wh is in Law ye sole act of ye Husband. Whenever they are sued together for a Tort if it don't appear on ye Decl^n, yt it was committed by her alone*, it is incurably bad. They are Pltly liable for Torts committed by her alone without Coercion.

And if both are sued for a Pt Tort and ye Jury find yt ye Husband ain't guilty and yt ye wife is, ye verdict don't aid ye Decl^n (ut Supra) This verdict shews yt they ought be joined, but in a different way. by charging the Tort to have been done by ye wife alone

Chief Baron has adopted ye Rule as laid down This depends upon Artificial Learning and perhaps (would be as well if ye verdict were allowed to cure) ye Decl^n were ye Precedents that way.

In Error vs Husband and Wife, conversion must be laid in ye Decl^n to ye husband's use only. Else Judgmt may be arrested on Error bot. For ye Conversion cannot in Judgment of Law be to ye use of ye Wife, as she can't at C Law hold personal Chattels - and if there could be a conversion to her use, 'twd enure immediately to ye husband. Cro. J. 657. 2 Rolle 6. 1 Bac

According to these authorities a verdict for Pltf wd not cure ye Decl^n J. G. thinks, yt a rigorous Rule. For ye Husband and Wife should be joined and ye mere allegation, yt ye Conversion was to ye use of ye wife, shd not. he thinks, render ye Decl^n incurable - for ye Court must know, yt if ye Conversion were then laid, yt possession immediately rests in ye Husband. Yelv 106.

If ye Wife is joined with ye husband, when she ought not to be, ye action may be abated. So bee berra and even if ye mistake is not pleaded in Abatement, in Error and motion to arrest judgmt is good. Ay action vs husband and wife for words charged to have been been spoken by Husband only, or for ye Husband alone for a debt of ye wife while Sole 7. J. R. 748. 1. Selw. 313. Com. D. Barn Feme 7. G. Cro J. 203 Yelv. 106. 8. 2 Mily 2217. 1 Vent 93. 1 Selw. 315. 13.

If a Feme Covert being sued alone, plead Coverture and prevails, she may have Ex^n for Costs in her own name (for she is ye only Def on Record) or by Scire Facias her husband and She may have Ex^n together. Doug. 614.

She wife when sued with ye husband, cannot plead alone nor can she appoint an Atty, for ye Law wont allow her (a Feme Covert) to appoint an Atty, ye husband must join 1 Eq 318. Cro J 239. The reason a Feme Covert cannot appoint an Atty, is ye same wh disables her to make any other Contract. Eq 2 318.

suppose her sued alone? there it is very semble. Doug 614.

70. For the Pltf having sued her as Sole, cannot deny her right to plead as Sole.

Of the Celebration of Marriage.

Marriage is a Civil Contract at C. Law. Secus in Catholic countries. Salk 120. 437. 1 BL 433. as to the mode of solemnizing marriage see 1 Bl. 439. 4a St Const 47 & 8. By our St publication is necessary either in some meeting on Sunday where the Parties or either of them reside, or by a written notification posted up about the church during Mass, during eight Days.

In case of Minors, publication and consent of Guardians or Guardian is necessary — in the old St publication or

76. consent. St Const 478. 1 Lev 189

If Clergymen do celebrate marriage contrary to the provisions of the St, the marriage is good and the penalty is incurred by the Magistrate or Clergyman Ibid.

Is a marriage solemnized by a private person or the Parties themselves, good. 1 Bl 439. & n. 3. Tis gen. deemed bad.

Bar Tem Bac. a. If good, why does the St authorize 3d persons to solemnize it?

Before the St 26. Geo 2d, if persons not authorized solemnized marriage, the K. B. wd prohibit the Ecclesiastical Ct from treating the marriage as void. Yet the Ct wd not grant admn of Wifes estate to the husband. Now by St 4th Geo. 4th regulating all marriages in Englt, declares all marriages contrary to its provisions void absolutely.

Void and Voidable Marriages

77.

Impediments to Marriages in Englnd are of 2. kinds.
I Canonical and II Civil.
I Canonical impediments viz consanguinity. affinity

and Imbecility are derived from y Divine Law 1C. y three last mentioned Impediments are cognizable in Eng by y Spiritual Ct. 1 Bl 434. 5. Previous Contracts seems to be abolished by St 32. Hen 8th and 3d Edw. 6th and 26. Qes 3d and 4th Qes 4th. 1. Bl 434. 5. The three first being derived from the Divine Law are hence incorporated into y Ecclesiastical Law of y R Empire. They have been sanctioned by 32. Hen 8th and a part of y written Law. It is declared in yt St, yt nothing (Gods Laws except) shall prohibit marriage without y Levitical degrees.

The Levitical degrees are y Standard as to consanguinity and affinity.

Nothing, Gods Law excepted, shall prohibit marriage the Levitical degrees. No Exception probably included "imbecility" it being an impediment in y Divine Law. Ibid.

Canonical Impediments render y marriage only voidable and yt only during y lives of both Parties, y Seperation being only "Salute animarum"

For y real object of y proceeding was Spiritual Discipline. and y spiritual proceeding being a divorce, it must be had, if at all, while both parties are alive. Co Litt 33. 1. Bl 441-34 Afterwards B R will forbid y Ecclesiastical Ct to decree y marriage void Salk 548. 1 Bl 434.

Rule. All Persons collaterally related by consanguinity or affinity in the fourth or any higher degree by the Civil Law Computation are allowed to intermarry, as first Cousins (yt are allowed in Catholic Countries) Among Collaterals, the most distant prohibited degree, is that of Uncle and Niece and Aunt and Nephew— It makes no difference whether this third degree is by Affinity or Consanguinity.

[illegible] affinity, [illegible] 2 Ld. to all 235. Ro. 181.

In Comnt be a late St a man may marry a deceased brother's widow St Comnt 478. 1 Bl. 7. Marriage w Sister of one's deceased wife has always been allowed here tho be some deemed to be illegal. The degree of affinity is y Second.

But tho a marriage is within y prohibited degrees, yet if no Divorce takes place during the Lives of y Parties, y issue is by y English Law legitimate. The Divorce is in such case "a vinculo matrimonii" Salk. 121. 1 Bl 440. Cart 271. Salk 548. Parent & Child Page 74.

In Comnt y marriage is declared "Null and void". and y issue illegitimate and y Question of legitimacy may arise after y death of both Parties. St of Comnt 479. 3. 5. The parties are also subjected to severe punishment for Incest. One of y most highly Penal offences known to our Law. except Capital. 4 Bl 64. 5. 1 Do 435 In Eng. Incest is punishable only in y Spiritual Court.

80. Second. Civil Impediments.

First prior Existing marriage. 2d Want of Age. wh is 12. or 14. Third. Want of Consent of Guardians or Parents. 4th Want of Reason. 1 Bl 430. 4. Parent & Child 74. Post 82.

1 Bl 435. These. it is said, render y marriage "void ab initio" so yet there is no need of divorce to set it aside. This Rule is now altered. where y impediment is y want of consent of y Parents by St 4. Geo. 3d

Want of age don't seem to make it void to all intents. See Infra.

First. Prior Marriage. Here ye second Marriage is not only void. but amounts to Bigamy, wh in England is Felony by St 1st James, 1st, by our St tis a high Crime. 1 Bl 436. 436. 4. Do. 164

Second. Want of Age. In ye case ye marriage may be ratified on ye Parties obtaining ye age of Consent. without another marriage. So ye intent ye marriage seems only voidable. But they may also disagree and rescind it without Divorce. in ye respect it seems void Co Litt 79. 1 Bl 436. In Females, ye age of Consent is 12. in Males 14. 1 Bl 436.

If one of ye Parties is under ye age of Legal consent at ye time of marriage untill yt Party has attained ye necessary age, and yt Party has ratified it expressly or impliedly, either party may disagree. The principle is. ye Contract to be binding must be Mutual Ibid.

Tho upon a contract to marry in future, if one of ye Parties is of ye age of 21. and ye other not, ye former may be made liable on failure of performance, but ye other cannot be. The Rule is ye same, as to all Executory Contracts between Adults and Minors. 1 Bl 436. Ch. n.

Third. Want of Consent of Parents and Guardians. is no impediment at C Law. but is made so by St 1 Bl 437. 8. Where ye consent of Mother or Guardian is required See Bl. 438. n. This is now abrogated by a new St of 4th Geo. 4th

Fourth

Want of Reason.

The marriage of an Idiot is void, and he must forever remain incapable of marriage — So of a Lunatic tho I conclude he might ratify a marriage at a lucid interval — But I have never known a case of this kind. 1 Rolle 357. 1 Bl. 414.

Our Court Law on this subject is very different from y Eng. in many respects. Ex. 1. A Marriage within y prohibited degrees is here void. Hence no Divorce is necessary to vacate it. Hence also the issue before Divorce is illegitimate Ante 79.

Second. Want of Consent of Parents doesn't render y marriage void here, but subject y Minister to a Penalty. In Eng. it makes y contract void, unless there is a Publication of Banns. 1 Bl 437. 8.

Third. The Impediments of Previous Contract were never known to our Law.

Is a marriage celebrated within another State between Parties belonging to this State, and who leave it (Count) for y purpose of evading our Laws, good here? The Rule of our Law not being complied with, tho y marriage is agreable to y Law of y other State 2. Hen. Bl. 147. 412. Bac. 114. Co Litt 79. b. 80. n 2 Burr. 1080. This is now settled by y unanimous consent of y profession and Public, in y Affirmative. Tho I don't think there has been any decision determing this precise point. The frequent Excursions to Gretna Green seem to divest y subject of all doubt with the Eng. Public.

Divorce

Divorces are of two kinds. First "a vinculo Matrimonii" Second. a Mensa et Thoro — The first is a Total — y second a Partial Divorce. The first is a complete Dissolution of y Contract. The second doth abolish y Relation of Husband and Wife, but merely seperate ym.

In Eng. those of y first kind can be obtained only for some of the Cannonical Impediments before named and these existing before marriage (as is always the case in Consanguinity) not supervenient as may be y case as to Imbecility and Affinity. 1 Bl 435. b. 40. These Causes of Divorce are cognizable in Eng only in y Spiritual Courts.

But there may be a supervenient Impediment of yr description, and in yt case there can be no Divorce, as Divorces cannot be obtained, unless the marriage be illegal, here I mean Total Divorces and I refer to y General Law of Eng. and such divorces as are grantable by Cts of Justice. For a Divorce "a vinculo &c is sometimes granted by Parliament and such Private and Special Acts of Parliament may be founded on other Causes yn y Canonical Causes or Impediments.

1 Rolle 358. 60. Co Litt 235 1 Bl 440. Bac. a. P.

When a Total Divorce is granted, y issue of y marriage is illegitimate. For y Divorce nullifies y Marriage "ab initio" ante 74. 1 Bl. 434. Shd originally they voidable 1 Bac. Bastard a. Co Litt 235. 1 Rolle 358.

The Causes of Partial Divorce in Eng are Adultery. and well grounded fear of bodily hurt. These are granted in the Ecclesiastical Courts Moore 683.

But Parliament of late often grants Total Divorces for Adultery.

Divorces in other cases are in Ecclesiastical Cts.

In case of Partial Divorce, y wife is generally entitled to Alimony to be settled in Eng at y discretion of y Ecclesiastical Judges, and for which if payment is not made, an action lies at C Law. 1 Bl. 441. 2. 1 Lev. 6. to enforce it, for y ecclesiastical Ct cannot enforce its decrees, for its power dont extend to Person or Property. Its power extends only to Excommunication. But in Case of adulterous Elopement and living in Adultery, Alimony, like Dower, is not allowed.

83. After a Partial Divorce, issue born is presumed to be illegitimate. For y decree of y Seperation is presumed to have been obeyed. But this presumption may be rebutted, and if so rebutted, they have all the rights of any Issue. Parent & Child. 75. 4. 1 Bl 457. 7. Co 42. 4 T.R. 356. Eb D. 450. 4. 5.

In case of Voluntary Seperation, subsequent issue is presumed to be legitimate. For as y Parties are not required by the Law to live seperate, no such presumption as that in y former case, can arise. By St of Comnt. Divorces are ordinarily ~~are~~ granted by the Supreme Ct. The Causes are 1st Fraudulent Contract. 2d Adultery. 3d 3 years willful absence or desertion with total Neglect, wh means. I suppose his neglecting to administer to her bodily wants and driving her away with violent abuse, is equivalent to desertion. Fourth. 7 yrs. absence unheard of. y Sup Ct may declare y Party at home. Single

Fifth 3. yrs absence on a voyage usually performed in three months unheard of or heard of under such circumstances as to render his death very probable, the Supreme Ct may declare the Party Single: St Comnt 236. 480. What is meant by Fraudulent Contract? it has been a subject of much speculation. It is generally held to refer to the last of the Canonical Impediments

"Corporeal Imbecility" wh is surely a great Fraud.

In y two last cases, y distant Party, is presumed dead. The same Rule of presumption (as yt in y fourth case) is established by St 1st Jam. 1st relative to Bigamy. 4 Bl. 164. 6 East 85. and by the St 19. Ch. 2. as to Lease depending upon Lives. D conceive, if it shd afterwards appear, y party were alive, y Lease would not be determined. "Insurance." 553. or 531.

The Decree of y Sup. Ct in strictness is only declaratory of y fact, yt y Party applying is Single—

In all the above Cases arising under our Sts, y Party who obtains y Divorce or is declared Single, is expressly authorised to marry again. The marriage of y other Party is also authorised by Usage.

See the Case of Frisby vs Frisbie when on the return of y former husband, y Legislature gave y wife her choice between the two husbands and she chose the former. But J. C. Mentry. the second marriage Lawful as tis declared so by Law.

The Divorces authorised by St and . . . granted by the Sup Ct are all Total. But the Legislature may divorce "a vinculo" or "a Mensa et Thoro" at its discretion — as to extreme cruelty. intolerable abuse see 1 Swift 133.

Total Divorces in Connt don't affect the Legitimacy of y Issue previously born 1 Swift 142. Since they are granted only from supervenient Causes, unless in y the Case of Fraudulent Contract, and that either supposes y impossibility of issue, or warrants a Divorce merely by way of Relief, to one Party vs the Fraud.

84. It don't make y mariage meretricious. In England where there is a Total Divorce granted, y Woman has no Dower or alimony granted, for as such Divorce is never granted, except for such Impediment as existed before Mariage, it renders y Contract void "ab initio" 1 Sid. 7. Co 70. 5 Do. 98.

A Partial Divorce don't deprive her of y rights of Dower. Ante N. 1. P. 9. 86. Co Litt 32. 33. 9. Co 19. Co Ch 463. Except in y case of Adulterous Elopement by St Westm. 2d

Indeed tis her Elopement and not her Divorce which bars her right in ys case. Ante 86. N. 1.

In the case of Total Divorce in Comnt, the wife has dower. if she is not the Faulty Party. also part of her Husbands estate, not above 1/3. may be assigned her immediately for alimony Ante 4.

Personal property may be granted to her as alimony, so adjudged by y Sub. Ct and affirmed by y Ct of Errors

85. So where y mariage is within y Levitical degrees, y Sub. Ct may assign to y Wife a reasonable share of the Husbands Estate, not above 1/3. (St Comnt 474) tho y mariage is "ab initio" void. This, I think, is peculiar to Comnt —

Finis.

Parent and Child 81.

No 1.

Parent and Child

An Infant or Minor is any Person under ye age of 21. yrs. Male or Female.

By the C Law full age is completed on the day preceeding the 21st anniversary of ye day of one's birth.

Priviledges and Disabilities

First as to Crimes. No person under the age of 7. is punishable for any crime whatever.

There are some cases in which Infants above 14. are priviledged with regard to Misdemeanors and offences; not Capital. There however are only offences of Omission and in General Infants are not liable for offences of omission: for an Infant is presumed to want prudence and foresight and besides he hant the means of performing what he ought to do, as he has neither time or property at his disposal.

But where an Infant is prosecuted, ty a Rule yt he ant to be convicted on confession without great caution and great perseverance on his part in yt confession – Particularly in higher offences.

A General St inflicting corporal punishment, sometimes extends to Infants – sometimes it dont, in Infants are expressly named – the distinction is, if a St creates such an offence as is punishable at C Law by corporal infliction, Infants. tho not named, are punishable

If a St prohibits an offence or an act under penalty of corporal punishment, but without constituting it such an offence as is corporally punishable at C Law, Infants. in named ant

punishable. This is sometimes called collateral punishmt. But when ye offence was punishable at C Law, but not corporally, Infants are liable to the C Law punishm. Co Litt 247. 357. Plow. 364. Cro J. 274. 1. Stauk. 1.

4. III Sorty - For Sorty committed with force, Infants are generally liable at any age, Civiliter. tho not Criminaliter. For Sorty committed with Force upon ye mere question of Guilty or not Guilty, ye concurrence of ye wile has nothing to do with ye case. 1 Sorb. 81. 1 Hawk. 3. 2 Role 547.

At what age is an Infant liable in Slander? 3 Bac 132. Noe 129. It has been determined at 13. 1/. he is liable. Gouldy. Rinky, he is liable when "doli capax" - Slander requires ye concurrence of ye wile - it necessarily includes malice, when "Doli capax" he is capable in Law of committing what in Law constitutes Slander.

5. An Infant is liable to be punished as a Common Cheat, not under 14. for under 14. the question of "Doli capax" don't arise. ni in cases of Felony.

1 Lev 169. 1 Salk 778. 905-913. 1 Sorb 71. Sy an Infant ant liable to a civil action for Fraud, but ye Rule needs qualification. In 1 Keb 414. tis said he is liable only for Sorty with some kind of force, but ye case of Slander is directly in they decision and Ld Mansfield and Seniors are opposed to ye doctrine in Keb. 1 Selwin 129. 258.

P. G. says ye true Rule is they. Viz. An Infant is liable to an action for fraud or deciet. Civiliter if "doli capax" ni subjecting him for ye fraud would virtually subject him on a contract. not binding upon him This Rule is inferable from ye following case — A bailed a horse to B.

a horse to B an infant. A brot an action vs B for overriding him. As for a tort, it was held, yt y action did not lie; for ys violence was merely a breach of y contract of Bailment — 1 Salk 305. 363. 8 T. R. 335. 1. Lev 103. 1 Sels 129.

Contra v. Coan 220. 2 W. Bl. 172.

But where ys objection doth exist, he must be educated after y age of 14.

6 As to Friend, it was once held yt if a person not renounced himself to be of age, when he was not, yt he cd not give Evi of his Infancy — Peake Evi.

There are cases in wh they will decree performance of a contract vs an infant to prevent fraud — In cases coming within ys Rule, y Chancellor acts as Guardian, & y Infant dnt wont impair y interest of y Infant — But ys cannot be done even in Equity, where y contract is absolutely void — for ys wd be making a new contract for y Parties. 1 Vern 70. 71. 3. Mod 78. 1. Eq Ca 189. 1. B Ch 353. 58.

P. 10. 1. Lb. Pb. 75.

7. Contracts. The Infant can bind himself by a contract generally and these contracts are either in general void or voidable — 1. Lb Pb. 75. P. 10. 1. Pb. 465.

If an infant and Adult join in a contract, y latter is bound, nt when y undertaking of y Infant is absolutely void. nt wh case this no Consideration on y part of y Adult and neither are bound? Dong 500 & Mod 190.

Dnt y Adult liable in an action vs both? No y Infant breaks in it, there being no variance in y case — Suppose they join in a single bill or note, wh is only voidable and y infant breaks in his plea, of infancy, y authorities are yt y Pltf cant have Judgmt vs y Adult, but must discontinue and begin "de novo", vs y Adult. 5. John 160. 3 Co 26 Pb. 75. 5 Bo 47. 1 Ch. 32.

Contra

But Quere is ys rule agreable to principle? For there

is no varance. There is a Pt contract in fact as said and y Plff must have Proved y Infant, I think, the ds Ramson says otherwise.

In 8 John 166. y rule laid down in y above authorities is denied and P Mark Property—

3 Mod 248. 2. Str 937. 1. Vent 57. Cro Ch. 502.

If an Infant contract with an Adult, y latter is bound tho' y former ain't. The privilege is y Infants and thus Personal. 1. Pow. 38. 1. Mod. 25.

The rule is y same in Law and Equity, A Specific performance can be decreed vs an adult, proviso y Infant performs his part and not without. 1. Pow. 39. 40.

1. [illegible] 8L v 8d y 7.

But y rule don't hold, if y contract quoad y Infant, is absolutely void, for there is no consideration moving to y Adult. Promise in consideration of a power of Attorney to y Adult, by y Adult. here y Adult ain't bound, for y Infant's power of Atty is void— 1. Pow 39. 40. 2. Str 938. 1. Pow 38.

Ps. 25. 40. 18 Promise Adult. 8d Promise in consideration of a power of Attorney to y Adult. Infa. power of Atty.

And if y Infant has recovered y consideration and boot avoids y contract, he ain't bound to refund, or restore it. tis consid.d as a Gift to him— 1. Selwin 179. 1 Lev. 169.

1. Hob 305. 13.

Quere y contract being disaffirmed, wd not trover lie? after y demand or indebitatus assumsit implied, Eo delicto as y sale may be, as if y Specific property remain in his hands?

Might not Equity interfere, under considerations to prevent fraud? do That Ct ed restore y property ed restore y property specifically, without impeaching or impairing his own proper estate? This a Ct of Law can't do, and ergo I conceive he can't be liable at Law. Ante 6. Post 40-5.

1. Pow 34. 5. 1. Rol. 466. Co. Litt 172. Cro J. 494. 8. Mo. 578. 1. Selwin 112.

But for necessaries an infant under some circumstances, may bind himself by contract. These are Prov. Approve, viz. — [illegible] being instructed in a manage

Mod 230,

12. But y things contracted about must be necessaries, or y infant at y time of contracting
The question, wn they are necessary is to be left to y Jury. Cro E. 560. & Cro Eliz 563.
to y distinction between matter of fact, and matter of Law. Carth 110.11.
tis yes, what description of articles are necessary, is a Ep. 162.
Question of Law, for y Judge, but what of any of those descriptions
is necessary, is a Question of fact for y Jury. Str 1101. 8 T Rep. 578.

ergo when y Def pleads infancy, y replication of necessaries
is good - generally.
For y matter issued, is matter of fact, not of Law. what
description of articles are necessary, is a y question of Law. but
what articles of any of these descriptions are necessary for an
Infant in any given case, is a Question of fact. (vt Tutor)

And Infant may bind himself for his wifes necessaries as
well as his own, for if he is able to bind himself in marriage,
he must be able to bind himself to y Incidents of y Contract.
Stus Wife 18.
So may an infant bind himself for his children's
necessaries, for being bound by y principal contract of marriage,
he must incur y obligations incidental to it.

So he is bound for y debts contracted before coverture

But an infant cannot bind himself even for necessaries
if under y care of a Parent or Guardian, or Master, and
duly provided for he is only allowed to contract, yet he may
not suffer,

Hence an infant can bind himself for necessaries only in
these three cases.
First. If he has no Parent or Guardian. Second. If out
of y reach of their care, Third. If being under their

he ant duly provided for.

But in the two last cases, y infant's parent, if he has one, it seems, is also liable, for Parents are bound to maintain their children and y infant's power of contracting in these cases, is intended not to discharge y Parent, but to relieve himself. Mosler and Perrot 5 T.

In strictness however, y infant ant bound at C Law, even for necessaries, by his express contract: for he ant of course liable to y extent of his contracts or agreements. but only to y amount of y true value of y necessaries. His obligation seems then to be founded on a contract implied.

As to The mode by Which an Infant may bind himself for necessaries by writing.

First. By penal Bond. he can't – (a single bond is an acknowledgment, made under seal of a debt)

Second. By a Single bond bill he may –

3 By a negotiable note. when actually negotiated, he ant bound – 1. T.R. 41. 1 Saund 73.

4. By a note not negotiable or it seems by a negotiable note not negotiated, he may be bound – 1 Barn's 408. n. Carth 160. 1. Saund. 72. 1. Sow. 34.5. Ch Bills 20.

5. By a bill of exchange not negotiated, it seems, he may be bound, but not if it be negotiated – 1. Saund 73. Ch. Bills 20. 528.
Carth 160.

6. By account stated, he ant bound – or an Insimul computasset. 1. T.R. 40. Co Litt 172. Lach 163. Moo 87.

As to reason of these distinctions.

II. The reason, why an infant ant bound by a Penal

bond, is, said to be, yt y penalty is to his disadvantage.
1 Sons 73. Co Litt 172. a. Cro Eliz 320

But y true reason appears to be, yt y consideration ant examinable: if therefore y Infant were bound at all by it, he might be liable for things not necessary, or for things beyond their value. 1 Pow 36. Ch Bills 20.21.

And y true principle of discrimination in ys and all y above cases seems to be, "if y consideration is examinable, he is bound, ie. he may be, y contract being for necessaries.

Seeas if y nature of y contract or security excludes an enquiry into y consideration, as in y case of y Penal bond. (vt Supra)

Second. Single bill, of wh y consideration was formerly examinable, this not now.
Ch. Bill 20. 1 Keb 362. 418. 32. 1. Roll 723. 1 Lev 86.

Is it not now examinable in y case of Infancy? I apprehend, it may be, or why is it not in y case of Penal bonds? In y case in Keb. Pltf replied necessaries, and y Ct held y def might traverse ys replication

In Criminal Cases, y consideration of a Single bond, is certainly not examinable.

Third and Fourth. Pea R 6 1. 215. 1 Esp R 117. 262

Of a negotiable note, negotiated, y consideration ant examinable. Of a note not negotiable, or if negotiable, not negotiated, y consideration is examinable. 2 Ro. 71. 1 Carnel 553. 1 Ab R 73. Dug. 614. 10. Johns. 33. 1. Wms. 403. Ch. B. 20. 1. 51. 82. 87. 1. Ponll. 73. 1. Pow. C. 34. 5. 341. Kid 155.

Fifth. Bxs. seem to stand upon y same ground as Negotiable Notes. vt Supra

Sixth. Account Stated. When y rule was settled, y items of an account were unexaminable. This doctrine is now, relaxed, but y Rule continues — Moe 87. Cro J. 602. 1. Pow. 36. 1. Ch. 40. 42. 1 Sonbl 73. He ant (ie Infant) to be capable of stating an account. Bull.

18. Where in y case of a Penal Bond, for necessaries, is y

Infant liable on y original ye Simple contract? It depends upon yo question. Does y bond merge y Simple contract?
It seems not merged, if y bond is void. For y Doctrine of Merger is founded on y idea, yt y lower obligation or remedy is swallowed up by y higher — But a void bond creates no obligation or remedy. (So in Gray vs Tollier 1. H Bl. 462) held yt a contract originally good is not affected by an usurious ~~consideration~~ obligation — analogous to Robertson vs Blandy

Quere when is y bond void? vide Post 29. 33 —

19. But a single bill does merge y original contract, It binds y Infants for necessaries — and if not, tis only voidable
Com D. 164. 3 Burr 1078. 1 Pow 218. 1 Str 12 49.
In Comm a note by an Infant, tho' not for necessaries is ~~not~~ only voidable. Now. 18. 9. decided by y Ct of Errors, to be void.

For money lent an Infant is never liable any way either at Law or in Equity, ni it is actually laid out in purchasing necessaries. At Law, he ant bound, ni y lender himself lays it out and even tho' y Infant shd do it, for y contract is good or not at y time of Lending
see Infra margin.

But if y Lender lays it out, he recovers y value of y necessaries, only, tho' y amt lent, shd be greater, so yt he recovers as vendor of y necessaries and not Lender. In strictness then, y Infant seems liable at Law, not as for money lent at all, but as for necessaries, purchased with it.
1 Salk 279. 386. 10 Mod 67. 5 D. 368 1 Pow 37.
1. P Wm 553
(Pow Chy 14) — 2 Eqty Ca 516. 1. Pow. 37.

20. The Infant is bound, if y money is laid in necessaries even by y Infant himself, y lender is then in y place of vendor,

as considered in Equity, and recovers y value of y necessaries.

But at Law he can be considered only as y Lender in y d case, and of course cannot recover at Law.

An Infant ant bound by contract for articles to maintain his trade, they not being deemed necessaries. Str 1083. Cro J. 494. 1 Salk 279. 1 Pow. C. 36. 1 Roll 729.

So an Infant ant bound by contract to pay for repairing his buildings. It ant supposed, yt y Infants trade is to languish, or that his house is to go to decay, but the Law supposes he has a Parent or Guardian whose business, it is to attend to these objects. 3 Salk 196. 1. Pow. 36.

But it is holden, that if an Infant take a Lease of a house, and reside in it, till rent day, (y rent not being above y value) he is liable for y rent in Debt. So also of a Lease of Land. Ep. 40

The lease of a house may under circumstances, be as y means of procuring Lodging wch is necessary. But as to y Land, Qu. upon what definite principles, is y rule founded. Is it Law, If so it seems an exception? Lost 37. Cro Jam 320. 2. Buls. 63. 1. Pow. C. 35.

An infant ant bound by a contract to say for instruction in Music, singing, and dancing. It ant are more accomplishments. 1. Selw 446. 1. Pow. C. 35. Quere at y d day, as y case may. At y d day if Persons of y Infants rank usually learn these Ornaments, they are as necessaries, as in a case before cited, as where a Son drawn from his fathers house by forcible, obtained collegiate education in another State, here y Father was held liable for his subsistence, as it was proved to be a proper education for y son.

21. Indeed an infant is bound at Law only by contracts or recoveries – Post 145.

But if an Infant does voluntarily what he (may be) ~~ought~~ is compelled to do either in Law or Equity, he is bound by y act –

4 Cruw 15. 3 Burr 1794 As if Infant makes equal partition with Coteneant –
1. Forbl 77. Post 145. Payr rent on a lease devolving upon him –
9 Co 85. So if he inherit an estate subject to a widows dower
1. Bla Re 575. and he assents or apportion it, y act is valid, nor at full age, he can shew in these cases, yt he acted to his disadvantage 2 Burr 684. 3 Bo. 1801. 2. Co Litt 172. 315. a

So if an Infant Mge, reconvey on payment of y debt – Post 144.
In Connt, his guardian may be decreed to make reconveyance
y St. 11 Connt 220. and now y Guardian or Mge's executor or adminr may on recovering y debt, release without a decree –

2 Ven 342. 429. This (when he does, what he (may be) ~~is~~ compelled to do) is y only
2 Ven 35. class of cases, in wh an infant is bound at Law, nisi for
1. Vern 295. an Infant def. is bound by a decree in Equity, nisi that
9 mod 128. he is allowed 6 months after full age, to impeach it for
2 P Wm 401. fraud or Error – 2 – ey 2. W. v. C. 1 of 1 W. v /
3 Bo. 352. 1 Forb. 75. 6.

22. An Infant Pltff is as much bound in Equity as an Adult,
3 ath 625. & has no ~~day~~ day, after full age, to set aside y degree
1. Forbl. 75 on fraud or gross neglect, appears in "his Prochein Ami"
or Guardian by whom y Suit must be brt –
any Person may bring in Equity a bill, or a Suit at Law, but he must be admitted by y Ct as competent, or y Suit will fail, there is therefore little danger of fraud or neglect – and if y Guardian or neal friend is guilty of fraud or neglect, he is liable to y Infant, and if y suit fail

tie, not y Infant, is liable for y Costs — and an they come out of y Infants estate at y final settlement, depends upon his conduct in y Suit.

Such acts of an Infant as don't affect his own interest, but take effect from an authority, wh he has a right to exercise, are binding tho an Infant Executor duly pays off and receives debts & discharges them — or executes an office he may hold — Com. D. adm. C. Toller. 356.7 — 3 Burr 1802. Ea. 215. 217 218

There is in Eng, a very recent St, wh forbids him to act until 21., such St take to be our law, yr occurs however hereafter.

A promise after full age will bind y Promisor to a Contract made before, tho' it wan't for necessaries — But not when y original contract was void — but only where y contract originally was voidable — Esp D. 163 — 2. T R. 756. 1. Str 690. 2. Ben. 203.
Post 37. 45. Chtly on Bills 21. 1. T R. 648. 1. Ponb. 131. 2.

21. And tho he shd have given while an Infant a written security, yet if it ~~ant~~ is absolutely void, a promise after full age will bind him, y original Parol contract being a satis consideration for y new promise, The original Parol Contract ant considered void, altho y security was — 3 Bac. 134.
Post 37. 8. 45. ante. 18 Post 29 — Bull. 155 Esp D. 164.
Ps 18. 29

Secus if y written security was only voidable, for there y Parol contract being merged, don't remain as a consideration, for y last promise, but y new promise ratify y security —
Post 24 — Esp D. 164. B M P. 155. 1. Root 55. &c.

But in yr case, y action might be on y writing, and y new promise, replied to y plea of Infancy. But where y Person after full age, makes a new promise in consideration of a contract made during Infancy, he is bound no further, yn y promise extends as a Man promises to pay 50 per Ct of y debt — Esp D 164.

to

24. But in y last case, y new promise can hardly be considered as a ratification of y original contract, as it varies from it, but rather a new substantial contract of wh y original one is y consideration. Suppose then a voidable security, (as a single bill) for 100 $ now given during Infancy, and a promise after full age, to pay 50 of it. might not y bill, tho' a Specialty, be y consideration of y subsequent promise, as the 2 agreements stipulate for different things, for y subsequent promise can't be a confirmation of y original security, but a new original undertaking to pay 50 $ in consideration of a Prior voidable security for 100. 8 Ante 7. 10. and a voidable undertaking or contract, is a good consideration, tho' a void one ain't.
Ante 7. 10. 18.

Decided in Court of Errors, yt an action on a note given by an Infant, ain't supported by proof of a new promise. Did y Ct consider y note void? P guere v.

Decided by same Ct, yt an Infant's grant is void under Statute.

1 Selwin 138. 2 Esp R 481. n Payment of money into Court, does not preclude y Def from availing himself of his Infancy, for y aint of y money so paid, may have been for necessaries.

25. If an Adult jointly interested with an Infant, in y Lease obtains a renewal of it, in his own name only, he shall be deemed to have acted as Trustee only — and y Infant or may claim his share of it, if it prove beneficial — Semble not.

If an infant is arrested and sued on a cause of action to wh his Infancy is a good defence he ain't discharged on motion, as a Feme Covert, but must plead his privilege or be held to Bail in short. Bet P. 480 — 408.

In Eng. y age of Choosing Guardian is said to be 14. in both Sexes [illegible] 1. 86. 46. 463

An Infant may be an Executor at any age, even in Ventre sa mere, but cannot act till 17. In y meantime, administrator durante minoritate must be appointed —
Carth 467. 6. Salk 39. Ld Ray 338. Off Ex. 307. Toller 31. 100. 101. 355. Hobert 250 —

now In Eng. by St 38. Geo. 3d he can't act till 21.
Poot 87

An Infant cant be administrator till 21. for an administrator must give bonds, wh an Exec^tor in Eng need not — and 5 Mod 395. wh he cant be able to do till 21. or full age — [illegible] Comb. 75. Cutt. 446. 5 Co 29.
[illegible]
In Connt also, one may act as Executor, tis said, by St, at 17. for he may then make a will —

By another St, every Executor must give bonds, St Connt. 208. Ideo Quere, an he calld a con act till full age — as administrator cant in England —

In Lecturing, I G. laid it down as a Rule, yt in Connt, one cant act as administrator, till 21. in consequence of his obligation to give bonds, wh he cd not till age — as in y case of administrator (ut Supra) 1. Lovelace 55

I know not what is meant by Bethrothing, an it amt to Bre contract, I dont know. It appears that y female was entitled to Dower, on y intended husband's estate: if she be over 9. yrs old at his death. By y C Law a female might be bethrothed at 7. but bethrothing is now out of use. Litt S 36. 2. Pb. 131. 1 Do. 463. P. 80. Bor. Sens.

Age of consent to marriage 12. to 14. But if one party

is of y age of consent, and y other not, y former may dissent afterwards, as well as y latter—

But on a contract to marry in future, if one of y Parties is 21. years old, and y other not, y former may be subjected for a breach of contract, tho' y latter can't be.
Hers and Wife. 80. No. 2.

The age for disposing of Personal Property at will, in Eng
2. Ven 104. 469. is, according to some opinions, 14. in males and 12 in
2. Mod 318. females, if proved to be of sound discretion and according
Pre. Chy 316. to others, 15. 17. 18. The former seems y better opinion—
1. P.C.C. 463. 2 Do. 497. for they agree with y Rules of ecclesiastical Law—
wh in Eng governs in such cases—

By Comm St 42 y age is 17. in both Sexes—

What Contracts made by Infants are void what voidable.

All contracts for infants not for necessaries are generally void or voidable— Ante p. 8. 9.
Its have lately inclined to construe y contracts of Infants as voidable only.

26. This construction is generally advantageous. to y infant, as it
Str 938. 1. Burr 660. allows him an election, when he attains full age, and y
3 Bo. 805. other party can't take advantage of its invalidity—

2 Ch. 502. 3 Mod 310. 1. Pow. C. 38. 38. 1st It is laid down as a General Rule, under yo head, yt
those contracts in wh there is an apparent benefit or semblance
of benefit to y Infant, are voidable only—
54. 1. Role 730. 2. H P.C. 511.

In cases of those in wh there is no apparent benefit, they are held to be void—

Where as to ye latter branch of ye Rule - see Post 38.
The rule in its nature is vague, for in ye many forms,
it would be difficult to determine an act one for ye benefit
of ye Infant or not. The first, ye think, correct one.
but I dont consider ye last a true one, a better one
may be found, post 31.
The purchases of ye Infant are only voidable, being
supposed for her benefit. Co Litt 2.3.8. 2. Ven 263. Cro J. 320.

So a Power of Atty to accept Rent is only voidable.
If a power by an Infant.

So an Indenture by an Infant Slave to serve his Master, 2 H Bl 511.
is voidable only, for it may be for his benefit, by working
an emancipation. By his faithfully serving.
But under ye last branch of ye distinction, it has been said
ye a lease by an Infant not reserving rent is void.
Hutton 102. 11 Mod 421. 533. 24.36. 2 Lem 216. Noe 130. 12 Mod. 162.
10. and 11. are not good authorities.
So if only a Trifle is reserved 3 Bac. 3.4. Sure? First
There appears to be no judicial decision to ye effect. 3 Bac. 13, 384.
3 Burr 1808. 1806. Second Weighty Reasons the other way.
Litt S. 5.47. Co Litt 308.a.3. Burr 1806. 1. Lev. 5. 3 Bac 304.
28. 5 Bac. 535. Title void, and voidable.
In other Cases, leases by Infants are said to be voidable
without any reference to Rent. 5 Bac. 535.
And Ld Mansfield has directly denied ye doctrine, and said
ye it had not been decided so, but that it was a mere
dictum and indeed he has disproved it upon principle.
For First, tis well settled, ye an Infant may make a
lease without rent, to try his title. and Second, ye Infants
Lessee can in no case avoid ye lease on account of Lessors
Infancy, This last consideration seems to me decisive upon
principle. 3 Burr 1794. 1806. 1. Term R 74. 1. Bl R. 578.
1 Row. 38. 1. Mod. 25. 2. T R. 161.

Again he cannot plead "non est factum" and ys is a exception. Mo. not universally — Cro Eliz 857 10. Co 43. 5 Do 119.

If a bill of exchange is endorsed by an Infant, ye Indorsee may recover of all ye Prior Parties, Mo. not of ye Infant — The Indorsement is only voidable and that only by ye Infant. Ibid. 172. 3 Esb 487. Marshall Ins 675. 6. Park Ins Do. 6th

29. Sis, said, yt a Penal Bond by an Infant is void, as it can't be for his benefit — ante 18. Cro Eliz 920. Stutton 186. 186. Esb D. 164 1. Pow 54. 1. Rolle 729. 5 Bac. 334. Void and voidable

Quere was ye point ever decided? I dont find yt it ever was, (ante 18) many opinions seem inconsistent with ys doctrine — Litt S. 259. Co Litt 172. Perkins Sec. 12. 154. 3 Burr 1804. 5. 1. Wilson 403.

And on principle, for first, he can't plead "non est factum" Pow. 47. Salk 279. Gilb Evi 182. 5. Co. 119. Ld Raymd 315. 2 Hen BlC. 515.

This indeed is not absolutely decisive, for he cant plead "Non est factum" to a Letter of Atty Ld Ray 315. 3 Burr 1804 1808.

30. If having given a penal bond, he bequeaths property for ye payment of his debts and obligations, ye Ct of Chy will order payment of ye bond. This however might be considered by some as a legacy to ye bond creditors. But wd ys Idea be correct? 1. Eqty Ca. 282. 3. 1. Wil. 403. 1. Ponb. 74. 1. Pow. C. 37.

Idea Quere. On principle, ye bond wd appear to me, but voidable, if so ye Infant's privilege is as secure as if void. The election it affords him, is beneficial, and ye weight of authority is balanced —

Quere also on ye last branch of ye above Rule, ante 26. is Law? does ye reason of it extend to any thing but leases reserving no rent, and Penal Bonds?

The rule itself seems vague and y Infants knowledge is guarded with it, and y election of y Infant is generally advantageous to him.

The first general branch relates chiefly to purchases, by Infant 31.
and is limited to them in its application seems agreeable to principle 12. it ain't contradictory to any settled principle or decided case, and there seems no reason opposed to it. The Last branch embraces Sales, conveyances and leases made and obligations entered into by Infants.

But as to sales, conveyances, leases and obligations by Infants, The true rule of distinction seems to be this, All Gifts, Sales, grants, leases and obligations, made by Infants, and not to take effect by delivery, are void. Those not to take effect, are only voidable. Litt S. 2. 59. Perkins S. 12. 19. 3 Burr 1804.5 Lech 10. 1. Roll. 730.

A Feoffment by an Infant is voidable only. 3 Burr 1805. 3 Bac 136. 1. Ponb. 74. 8. Co 42. Litt 247.a.250 4 Co 125.a. Perkins S. 2.59.

How came y rule and y subsequent rules, be overlooked for be y first distinction (rule 26.) or even reconciled to it?

32 So if an Infant sell a chattel as a lease or horse and deliver him, the sale is only voidable, if not delivered, to void. and y Purchaser liable in trespass for taking him. Perk. S 12. 19. 1. Keb 778. 1 Mod 137 Keb. 77. Lech 10.

The words, "not take effect by delivery" are an essential part of y Rule, as to decide aw, and make a difference between deed not convey an interest, and those, not delegate a power to convey. The first are only voidable, and y latter void. 3 Burr 1804. 5.

As Infants leases, releases, &c by deed, are in general 5 Co 119.
voidable only. They take effect by delivery. 12 by delivery Lech 66
convey an interest. Title "Deed 38" Perks S. 12. 8. Co 42. 3

3 Burr 1804

Hence if an Infant deliver a deed of conveyance, and soon he obtains full age, he delivers it again, y second delivery is void (as a delivery) because y first had y same

Will however ratify y deed, & confirm it, "ab initio"
"Deed 39" 3 Bac. 135.

33. But a power of atty is in a sense a deed, & it must take effect by delivery. 3 Bac 136. B. 2. Inf and age.

Thus if an Infant gives a power of atty to an trs to convey his whole, he may seal y purchaser under y power
Noe 130. 1. Bl Rep 378. 7 1. Bl Rep 75. 3 Burr 1804.8. 3 Bac. 136.8. 142. 11
as a warrant for entering under y conveyance.
Secus if a Power of Atty be accepted & acted on — Tis voidable only, or tis introductory to a purchase —

Mr Powell, however denies y distinction between Deeds conveying an interest and those delegating a power —
Pow C. 32. 3

Upon y whole, y Law upon y head appears to me to be contained in y first branch of y first rule (ante 26) wh relates chiefly to purchases by Infants and is y second rule wh relates to their grants, leases, obligations, &c ante 31.

34 The result seems to me, yt purchases by Infants are voidable only, yt is hereby y first branch of y first rule, and that conveyances, deeds, &c are voidable only when they take effect by delivery, but void when they dont thus take effect, this is under y second rule —

Tuth and Parsons 3 Burr 1807.8. 1. Bl. Rep 579.
Perhaps y rule as to contracts taking effect by delivery, tho it furnishes a general criterion, ought to be modified by y last branch of y first rule — Thus if an Infants knowledge not be strictly guarded, by conclusive y contract voidable, when an interest passes by delivery it will be void by way of exception — Secus tis only voidable. So Says Ld Mansfield —

as. Case of an Infant agreeing to sell 2 ounces of her hair, in wh case ye barber to obtain ye 2 ounces, literally shaved ye young lds head, in ye case she brot an action of assault and battery, wh was allowed to lie—
This is ye only exception I know. and probably wont occur again — 3 Keb 363.

Executory Contracts ye Infants are generally voidable, only — as a promissory note — Mars En 675. 6. 4 Esp R. 487. Hob 102. 1. Mod 25. 137. Esp D. 164. 1. Vern C. 38.
That a promise of an Infant is void and yt if an adult and an infant join in ye promise, ye former may be sued alone — see — 5 John 160. Cp. Fart Dn 432.

As to Penal Bonds, Sure ante —

30. A bond of submission to arbitration by an Infant — is said to be only voidable
In some cases, these distinctions are momentous in practice —

Different effects of void & voidable contracts —
1st If a contract is void, third persons or ye adverse party may take advantage of its Invalidity [as creditors may of a fraudulent conveyance —

If voidable only — ye party for whose benefit its made and his representatives may take advantage of it — 2 H Bl. 511. 3 Burr 1804. 6. Sir 93. 2. Ro. 503. 1. mod 25. 1. Vern C 48. 4 Co 124. 8. Co 42. 1 Ins 16. 74.

If a voidable conveyance is made of Real Estate, only ye original party and privies in blood [as remainderman or reversioner his privies in Estate cant. can take advantage — 1 Co Litt 387. 8 Co 42. 3 Roll. 705.
i.e. his privies in blood may but privies in estate as reversioner or remainderman &c cannot.

37. Second. void contracts may be affirmed by y Infant after he attains full age, and y express motives may be express or implied. as if a lease is made to Infant, and he remains in possession after full age, yt implied confirms it and makes it good and he is liable for rent and even for yt wh accrued during his minority, for he ratifies "it ab initio" Post 45. ante 20 –

2 Bulls 60. 5 Bac 534 Wood and Ble 3 Bac. Infan. K. 7. Co Litt 3. a. Cro P. 320. 2. Bentrs 203.

2. Ben 203. Co Litt 3. a. 2 Bulls 60. 1 Sanb. 130. 1. 2. 1. Pole 731.

So if he makes a lease and accepts rent, after he has attained full age – he thereby ratifies y lease – Post 40 – see Pulsoro Subra.

So any act evincing an intent to waive y knowledge of Infancy or to confirm y contract, has y same effect.

2 Bentr 203. Co Litt 293. Sa 690. 3 Co 65. Cro P. 320.

38. But a void contract or act can't be affirmed, it being a mere nullity as a Power of Atty by an Infant to convey or lease his land, in pursuance of wh a lease is made here his act or declarations made after full age, can't ratify y Lease, (as where an Infant Lessee takes a new Lease of y same interest, neither increasing y terms or diminishing y rent, y second Lease is void and cant be ratified

2 T Ro 766. 3 Co 64. B Cowp. 201. 482. 7 T R. 63. Doug 53. 1 R R 75.

Co Litt 380. 12. Co. 122. 3 Mod. 229. 12. Co. 197. 248. 1 Pow. 21. 23.

An Infant having conveyed by Common Recovery or Fine, may avoid y conveyance by writ of Error, during his minority, but not afterwards, for his age can be tried only by Inspection, by y Judges. no averment to be tried by y Country, as admitted as y Record.

Co Litt 247. a. 380. Sichherb. 132.

as y Ind mt

* It is said that an Infants conveyance by matter in Pais * is voidable either during his minority or afterwards.

2. Par. Child.

But it seems settled now, yt a feofmt by an Infant cant be avoided, till after full age for his reentry is itself not Co. 247. a 380.
binding, and of course y original feofmt remains only voidable and may be confirmed at full age. Ergo a Stranger cant avail himself of a reentry by y Infant. T. Sherber 192
3 Burr 1794. 1808. 1. Bl Rp. 579. 2 T Rp. 161.

Same rule obtains, if y conveyance is by feoff or release. Ibid.

40. So if an Infant make a lease for yrs. 2 T Rp. 101. 3 Bacon. 13. p. 8.
So holden by Ld Mansfield. Hardwick and y Ct of B R.
Cases, Co Litt 380 3 Bac 140.

Sales of Personal property by Infants are voidable at any time I suppose.

Exemplt Cases in Equity.

Marriage settlemt agreemts made by Infants, with consent of Parent or Guardian are in most cases binding in Equity. Such agreements being necessary to y primary & principal contract. 1 Pow Con 42. 44. 1 Pow Chy 152.

For Equity assumes a sort of discretionary control over Infants and directs their conveyances pro tanto & circumstances & y Cts enforcing many contracts, void at Law, and vice versa.
1. Ins. 444. Pow. Chy 44.

Thus y interest of a female Infant in a marriage money, has been holden to be bound by such agreemts, made before marriage. 1. Br Chy 111. 4 Ves 613. B. 1. p. 1.
Pow 44.6.

It makes no difference wn y wife's interest is in possession or contingency it depends on contingency

So it is well settled, yt a Female Infant may bar her right of dower, by accepting under such agreemt, a settlemt by way of Jointure and even if y settlemt is of Personal State. This cant be done in Law. 1. Eq Ca. Ab. 171. 2. 1. Ro. Ab. 52.
Ibid. Cliff 45 2. Ver 7 Ca. 50. 1. Ver. 52

whether a male infant can thus vestate his real estate (E. in estate of Inheritance) it is said, ant yet decided 4. Cruise 19 — That he can't 1. Ton ob. 08. /0.

42. It has been decided, yt a male infant lease, for lives was good, if made with consent of Parents.

Co 104. . Sow. 6. 52. 2. P Wms 229 —

Macclesfield

and it was seen holden by Ld Mansfd, yt if a female infant seized in fee, covenants on marriage, (with consent of Guardian and in consideration of a competent settlemt.) to convey her inheritance to her husband, & wife wilt execute y agreement — 2 P Wm 243. 1. Sow. 6. 48. This says Ld Hardwick, is going great many, yet there are cases, when y Ct will do it, viz where y settlemt by y husband is an adequate settlemt — or consideration, and y wife leaves issue —

3 Atks 513. 5. 4. Cruise D. 16. 1. Sow. E. 50 —

43. But tis said by Ld Thurlow, her real estate will bound, wn she has a settlemt, and after her husband's death, takes possession of it. and y Ct shd not go into y competency of y settlemt.

Ld Thurlow then, is of opinion, yt a subsequt ratification after y wife becomes married, is necessary. 4 Br Chy 316. 510. or 70. 3 Atkins. 453. n. 4 Cruise D 17. 18. These last deny y rule laid down by Ld Mansfield, and Hardwick. Upon y whole, Ld Mansfield's opinion is much shaken, if not overruled, and there seems to be a difference upon principle, between y case of an agreement to settle an estate upon y husband during coverture, or for his life, (wh may be deemed necessary by way of family provision) and yt of an agreement to vest him with y inheritance, wh can hardly be supposed necessary for yt purpose —

At any rate, it seems agreed, yt any contract by a female Infant, to vend her real Estate, is not binding, wn made before marriage — 3 Atk 56. 3 Br. P. C. 511.

1. Ton 70 —

The question on a Male Infant can bind his estate by such an agreamt, is said not to be settled ante 41 — 44.
41. 4. Cruise D. 13. said he cant —
But it is clear yt if on marriage with an adult he covenants yt her real estate shall be settled to certain uses, he is bound by it, for his own original estate ant affected by y agreamt, and she is of Legal capacity to settle hers. 4 Cruise D. 13. 2. Bro Chy 545. 1. Ford. 70.

But no agreamt made on marriage by an Infant to settle his or her estate, will be enforced, nr it be fair and reasonable and upon adequate compensation 3 Atks. 615. 1. Bro Chy 115. 116. 152. 2 P. Wms 244. 1. Pow 50. 4.

If an infant capable of making a will, bequeath personal property for y payment of his debts, his executor is bound in Equity to pay them, ante 30. 1. Eqty Ca. 282. 1. Ves. S. 3. 1. Wms. 403. 1. Ford. 14.

An Infants contracts may be ratified at Law, after full age, ante 37. So in Equity a contract made by another for an Infant, may be impliedly as well as expressly ratified by him after full age — As lease of Lands, belonging to minor children, for 40 yrs by their mother, they having rec'd the rent after full age. The Ct of Chy established y lease, 1 Atks 489. 482. 3. Bac 140 ante 22.

What powers an Infant may execute?

An Infant cant execute a general power,* over Real Estate from a supposed want of discretion, as a power to appoint each person as he shd think proper — Pow. 203. 304. 3 Atks 615.
* i.e. discretionary power — 3 Bac. 138. n. Pow P. 47.

But a naked, special Power, an Infant may execute — for here is a mere instrument having no interest, nr can be affected, for a naked Power is one without interest — and no distinction is necessary — as a power to convey — Pow P. 43. 48. 3 Atks 710. 14. Co Litt 52.

46. But an Infant cant execute a power over his own inheritance, as it would affect his own interest, tho a Feme Covert, (of full age) may — 1. ves 305. Pow. P. 43.
said in 3. Atks 7/10 no precedent in ye of Law, or Equity yt a power over a Real Estate may be executed by an Infant, (3 Bac. 138 n) This is too general a proposition — but must mean a General Power — 1. ves. 304. Pow. P. 47.
2 Bac. 138. n. not 138.

The general rule seems to be, yt Infant not interested may execute a power so as to bind his principal to ye extent of it, if it dont amt to a discretionary power over real Estate — Ibid.

ves 303. And he may execute even a general power over Personal
Pow. 54 estate, (tho his own interest is affected by it) if old enough to bequeath it by will. Secus not. as Bequest of Personal property to an Infant with power to dispose, of part or ye whole, to whom he may think proper —

47. An When an Infant Tenant for life, with power to make a Jointure, covenanted in pursuance of ye power, to settle part of ye land on his wife for life, ye Covenant was holden Good in Equity. and here ye power was Special —

What Offices an Infant May hold.

The general rule is, yt an Infant may hold a ministerial office, wh requires only skill and diligence. But not a Judicial one. as he may be Bailif. Steward. Gaiter. The Judicial office is supposed to require Judgmt and discretion —
Co Litt 3. Co 3 Co Elis 638.). 3 Bac. 123 — 125. 125. 136.
in Cro tis said he cant be steward of a Manor. where what office involves Judicial power —

Ibid. The reason given, wh an Infant may a ministerial
11. Co 4. Co office, is, yt if he is incapable (as before he attains ye years
Co Ch. of discretion) it may be executed by another — a Deputy.
2 Ty. 556. 4. Mod. 2, 9.

Quere then an he can hold any office, wh cant be executed by Deputy.
Quere as to y Law of Connt, can he hold any civil office?
I don't know yt he can –

An Infant cant be an Atty,* for he cant be sworn as yt office requires. besides y duties are attended with responsibility. 3. Bac. 26.

This ant y case in all y State of y Union, as Georgia Infants are admitted at almost every session of y Legislature, to practice as Attys and Counsellors at Law, provide they can pass an examination in open Ct.
I. Thaffer know a man only 19. practicing in Georgia –

Nor can an Infant be a Juror for y same reason, and because a Juror acts judicially 3 Hb. 325.

An Infant may be an Executor at any age, but cant act as such till 17. 1. Now by St 38. Geo 3. he cant till full age, ante 7.

Regularly an Infant officer is bound by his official acts, and liable for his neglect of duty. As Infant Gaoler is liable for an escape – and liable in debt, if y escape is upon execution. Plow 364. B. 5 Co 27. a. b. 8. Do 3 Mod 222.
2. T.R. 129.

How far an Infant is affected by y nonperformance of conditions annexed to his office or estate Conditions, are of 2 kinds Express and Implied.
First. By Express conditions, infants are bound as well as Adults. Ergo If an Infant hold an estate, to wh an express condition imposing a forfeiture, is annexed, he forfeits y estate by nonperformance, as A Mo's Infant Heir, to whom y Land has descended, Co Litt 246. V. or B.
2 Bern 560. 333. 43.

1. Ven. 133. 1. Lev 21. 8. Do 44. Carth 43.

50. But there is an exception to y last Rule, where y condition imposes a Penalty 12. a forfeiture distinct from y loss of y Estate. In such case, y Infant ant bound to pay y penalty. 1. Vent 250. Carth. 43. Co Litt 246. B.

As if a Lease be assigned or bequeathed to an Infant, under wh Lessee was bound under some condition to pay double rent, The Lessee and his representatives may be subjected to y Penalty, but not y Infant.

2. Implied conditions may be either at C Law or by St Law. Implied conditions at C Law are either founded on skill and confidence or not so founded. 8. Co 44. By y former, Infants are bound, as when a stewardship is granted to an Infant in fee, he forfeits y office by misbehaviour or mismanagmt — 8. Co 44. B. Co Litt 233. B. 1. Sanb. 82. 83.

Cro Ch. 556.

51. By y latter Infants ant bound. as. If an Infant Lessee for life alens in fee, there is no forfeiture. (So of a Feme Covert) 8. Co 44. B. 1. Rol. 854. Co. Litt 233. B.

As to conditions implied by St Law, (Rule) Where y St gives a recovery vs Tenant for nonperformance or breach of y condition, Infants are bound by y condition. as Lessee for life or yrs forfeits his estate by waste, either voluntary or permissive — for y St of Gloucester gives an action to recover y thing wasted.

52. But where y St Law merely gives a right of entry, and no penalty or recovery, y Infant ant bound, as If an Infant alien in Mortmain 1. Sanb. 823. here there ant no forfeiture, for y St gives y Lord only an entry. but no action to recover.

Query as to reason of these distinctions?

Infants are bound by Sts of Limits, ni they are specialty.

excepted. 1. Ver. 31. Pre Ch by 518. 1. Eqty Ca 304.
The Sts of Limts are in y nature of conditions annexed to a right.

And if an Ex or adm or Trustee, for an Infant, don't sue within y time prescribed by St (he having power to sue,) y Infant is bound by y St, y exception taken
3 P Wm 309. barred 3 P Wm 309.

This rule must relate to cases in wh y Executor has a right to sue, in his own name, on a contract in favour of y Infant's Father, deceased, or on an obligation given to an Executor in trust for an Infant and not to presume, to suits wh must be brot in y infants name, and in his own right, for it wd repeal y Saving in y Statute, The rule holds in Equity as well as at Law-

In what manner Infants are to Sue - and be Sued -
12. by Whom to appear -

I have already treated of y rights wh Infants may acquire, and of y duties wh they may incur by their own acts, &c We are next to enquire of y means of ascertaining those rights and enforcing those duties.

First. How Infants must sue -
An Infant must always sue by his Guardian, or Prochein ami. He can't appear by atty, because he cant appoint one - ante 33 - and he is supposed incapable of conducting a suit himself.
Cro E. 640. Palm. 225-50. 3 Bac. 148. 10. 1.

So If an Infant sue without his Guardian, or prochein ami y Def may defeat y Suit by pleading to his disability - 3 Bl. 301.
Co Litt 135. B. Carth 123. 2. Saund. 212.

Anciently an Infant Pltf cd appear by guardian only, and not by his next friend in any case - but y St of Westminster, 1. 32.

Cro P. 640. enables Infants to sue by their next Friends in certain cases
Palm. 285 Str 708 ie in cases of necessity —
3 Bac. 149.
The cases in wh an Infant may sue by next friend are 4
Hutton 92. I. Where he sues his Guardian Cro P. 640. 3 Bac. 149.

II. When y suit is vs a Stranger and y Guardian wont appear for him, Ibid Str 369.

III When y Infant has no Guardian —
Co Litt 135. B.

IIIII. When he is changed ie. out of y care of y Guardian —
Cro P. 640. Palm. 285. 6. 3 Bac. 149.

In le y above cases, he is obligded to sue by an next friend —
In all other cases, he must still sue by his Guardian —

According to some opinions, an infant may sue in any case,
5. Bac. 148 by Guardian or next friend — Hutton 92. Cro Ch. 86. Co Litt 135. B.
And this taking away y Guardians control and authority, it seems —

5c. If husband and wife sue, y wife being an Infant, she need not appear by Guardian, but both may appear by Atty, named by y husband, he being adult —
2. Saun 213.

Where an Infant sues by Guardian, y latter is liable for y costs, and is compellable to give security for ym, So when y suit is by his next friend, y latter is liable to costs, and both are liable to an attachment for nonpayment — ie. Guardian and next Friend — 1. Eqty Ca. 72. Str 506. 1026. 1. P.R. 481.
Sitle. Evi. 114. 1. Phil Evi. 48 1. Mc. Maly 60. 1. Wils. 130.
2. P.Wm 288. According to some opinions, y Infant is also liable for Costs, in wh Def may proceed vs either at his election — Gilb Eq 87.

5f. This rule ~~is~~ laid down in P. Wms was denied on a rehearing by Ld Hennin, who said, there
Str 708. was no decision yt an Infant Plff was liable for costs in
Cro El. 33 law or Equity, and ergo he need not find pledges at the law —
2. Eq Ca 238. 1 Wils 130.
Milford Ca. 26. 3 Bac. 147.

The Defend. the y better opinion, for y Infant will in fault, y bringing a Suit, will be not, it ant brot in his name by his Guardian &c. and y question, an y Infant Estate shall be ultimately charged, shd be reserved to y settlement of y Guardian's acct.

If costs shall be given, twill be error, 12. vs an Infant Pltff.

2. Str 1217. Barnes. 105. 128.

If Infant Def. is clearly liable for costs, for whenever he is subjected, he is deemed to be in fault, in withholding y Pltffs 58. Rights Fis 12/. Dyer 104. 1. Eub. 89 Ct 226. Esp D. 164

That y Guardian on record of an Infant Def, is liable for costs. Quere and if so he is liable in y present instance for when Judgmt goes vs one as Def, he is always in fault. Esp D. 164

This ant law and there is no authority to support it Esp D. 164

In England, both y guardian and Defendant any, must be admitted to appear by y Ct, or y writ out of Chy, yb y Infant may not be injured, by acts of an infant per abscondition

Carth 256. 3 Salk 603. 1 Str 304. 709. La Raymd. 232. Palmer. 225. 2 Ed. Ch.

Comnt.

When y Suit is by Guardian, y Court to, (I believe) never enquire into his qualification, but if by next friend, he is admitted by y Ct., tho a tacit admission, it has been said is sufficient. Quere at present.? Esp 410. 412. 1. Com Pl. 584.

Any one may bring an action as next friend, for an Infant, 59 and even without latter consent for he does it at his own hazard. 1. Eq. Ca. 72. 2. Bac. 680. Gmard. 3 Bro 149. 157. 1 Ba Com 464 Ro 1. Ov. 1. P. on Ov. 3. 81 7 Q. 3. 5 2 v. 6.

But tho he commence y Suit, he may be dismissed by y Ct, 1. Ba. 464

If an Infant and adult are executors, in an action brot by ym, both may appear by Atty, for y suit is in "Aulter Droit" and y adult may make an Atty for both. In y case, y action being in another name, y Infant ant liable for Costs. 2. Saun 212. 213. 1. Vent 102. Carth 123.

La Raymd 232. 600. 149.

3. Mod 236. Stile 318. 3 Bac 187. Foller Ex 472. Yelverton 130. Stra. 748.

Secus. If they are sued as executors. in yo case y proceeding is as to ym, "in invitis" They don't voluntarily join as Co parties and y ringing a suit, don't imply any admission by either of ym, yt they are actually Coexecutors. Besides y Infant def. might be otherwise subjected to costs, "de bonis propris" by mispleading — Post 54.

So it is said, (Cro Eliz 542) if an Infant Sole executor sue alone,* he is liable for costs, This rule is denied and seems not Law — he may appear by Atty. 1. Role 287.
Carth. 23. | Bents 102. 3.

Even if y original judgmt was for y Infant, as y C Law is. 2. Saund 113. n. Contra Cro J. 4. 441. argueado., it wd be wrong —

00. How Infants are to be Sued Second

An Infant 2 of must always appear by Guardian, and not by "Prochein Amy." for y Sts 13 2. Westminster, don't extend to actions vs Infants. Cro J. 540. Hutton 92. Co Litt 131. Hob. 265.
2. Bac. 680.

If an Infant appears by atty or by himself, when he ought to appear by Guardian, is wrongful. The plea is signed by y Guardian and yo is what is meant, by Pleading by Guardian.

Note by y Guardian. in y Gen Rule is meant, not y Guardian of a Infants person or estate, but one appointed for his suits in General by letters patent — out of Chy — or one appointed by y Ct in wch y Suit is brot —. Co Litt 135. B. n.
2. Bac 678. Pickers. 27.

And in an action vs husband and wife, (y wife being an Infant) she must appear by Guardian —

His being next friend don't enable him to act for her as Atty. The husband can't appoint an Atty for both,

Secus if she is of age, or if she be married. ante 56.

If an Infant having no Guardian, is sued, y Ct must 61.
appoint one "pro re nata" Such an one is called Co Litt 89. 135. B.
Guardian ad Litem – Post 133. Sec 53. B. [illegible]
2. Lev. 135. 3 Bl. 427.

If there be no Guardian appointed, y Judgmt wd be erroneous. The authority of y Guardian "ad litem" extends only to y suit, for wh he was appointed.

But if y Infant has a Guardian, y Ct can't appoint one "ad Litem" ni y former is out of y reach of Process, Stile 456
or has misdemeaned himself. 3 Bac. 150. 1 Salk 424

If then an Infant having a General Guardian is sued, y latter shd be summoned to defend for him – The Court however dont state, if y Guardian ant summoned, but time is given to cite him to appear –

If an Infant when sued, appears by attorney any judmt 62.
is given vs him. tis erroneous and a writ of Error "Coram vobis" lies Yelv. 58. 2. Bac. 218. Cro J. 640. Station 32.

So if his Guardian ant cited and judgmt goes vs him by default, tis erroneous. Kirb 116.

3 Bac 150. 63.

So it seems if an Infant Plff appear by atty, and judgmt goes vs or for him. tis Error at C Law.

3 Bac. 150.

If a judgmt is for him, but y weight of authority is vs yo opinion in Cro J. 441. Cro E. 542.

But by St 21. J. 1. 4. Ann c. 18. if Judgmt passes for y Infant upon verdict, y other party cant reverse it. 2. Bac. 138.
3 Bac. 43. 150. Cro J. 580. 2 Saund. 213. n. 1 Bac. 93.
[illegible]

And by St 4. Ann. ch. 16. ye rule is ye same with ye last. if judgmt is for ye Infant by confession, "nil dicet, "or non sum informatus" 2. Saund. 21. 3. n. — On these Sts, nothing is said of Demurrer. — tis as at C. Law. P.G. but tamen these Sts, his infancy is still pleaded in abatement in these cases. Carth 123. 2. Comyn Rep. 357.

If an Infant is sued with others, who are adults, and appears by Atty, and entire or Pt damages are given vs him, ye whole judmt is erroneous, for ye Ct cannot apportion ye damages. 3 T R. 435. Carth 367. E. Co 58. Str 189–808. 4. Burr. 2022.

288. Hob 176.

Auter. If damages are severally assessed, judgmt is then reversed quoad ye Infant only. for yo is substantially ye same, as if there had been several distinct judgmts

64. In Covnt, it has been determined, yt when Adults and Infants are sued together, as Trespassers, (ye Guardian not being cited and all appearing by Atty) The Judgmt vs ym is erroneous quoad ye Infants only. tho' ye damages were entire or Pt. Lev 125. 116.

Quere. For tho' each is liable for ye whole and there is no consideration, yet if ye adult had sued alone, a different assessmt of damages might have been made. The Infant may have ye ringleader &c.

If an Adult and Infant are sued alone, as Executors, ye Infant must answer by Guardian —

If an Infant and adult join in a Fine, it may be reversed quoad ye Infant only. Because their interests are distinct and it is in ye nature of a Common assurance or conveyance. Sch. 278. Cro Eliz 115. 124. 2. Leon. 108.

How Far y Law regards Infants in ventre Sa Mere — 65

Infants in ventre Sa mere are to many purposes regarded as in esse, they are now so considered in several cases, in wh they dam were not. 1. Bl 130.

The killing of an unborn infant, however, ant murder, but a high misdemeanor or misprison. 1 [illegible]

But if y child having received a mortal wound or Injury in ventre Sa mere, is born alive and then dies of y wound, within a year and day, after y Injury done, it is homicide and may be murder. The child is regarded in Esse for y e purpose. 4. Bl 198.7. 1. Hawk. 121.

Contra 1 Hale, Pls. Cr. 122 [illegible] y. 6 [illegible] y 4.
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An Infant in ventre sa Mere may inherit, till y birth y estate descends to y heir apparent or presumptive and is then divested in favour of y new born heir, as if a man dies, leaving only a daughter born, and a posthumous son is afterwards born. 1. P Wm 486.7 2. Bl C. 208. Doug 431.
Hob. 3. Co 95. a. 99. a.

An Infant in ventre Sa Mere, may take by devise, as y Law now is. Stat Tenes. 66. Infra. sec.

So of a Legacy — for y distinction see. Devises 68. 72. 1. Inv Ch 386.
1 Ves 114. Vide Infra. 1. Ver 135. 2. P Wm 28 1. Bos Pull 243. 1. Bl C. 130
Till y birth of y Devisee, y estate descends to y heir and is then divested in favour of y posthumous Devisee. Fearne Rem. 438. 32.
1 Ser Chy 386. 1. P Wm 486. 5 T R 48. 57. 4 Burr 2157. 1. Bl R 648.
2. Do 28. 2. Mils 225. 3 Do. 526.

An Infant in ventre Sa Mere, may take under y Act of distribution. 2 P Wm 448. 2. Atk 117. "Title Ex adms. 106."

67. So under a Term for raising portions for such children as A shall have at his Death. "posthumous pso nato habitur" Fre Ch. 50. 1.
[illegible] y — [illegible] P Wm 2 [illegible] 342.
2. 4 Bl 22.

So under a bond in favour of such children, nt Suppose An Injunction to waste lies in behalf of an Infant, in ventre sa, W an estate limited to A for life, remainder to y unborn child of B, an injunction lies in favour of such unborn child. Bern 711. 11. Prec Ch. 53. 2. abr 117.

Under St 12. Ch. 2. an Infant in ventre sa, may have a Testamentary Guardian, if one appointed by y Father by will or deed. 1. Bl. 462.
An Infant in ventre sa, may be an executor but cant act till 17. and if 2. are born, they shall be coexecutors,

But By St Geo 3d. 28. not till full age, ante 7.

So if one devise or bequeath to y unborn child of A, and 2 or more are born, they take jointly —
Cp. Ec. 307. 3 Bac. 22. 5. Co 29.

68. The Relative Rights and Duties of Parents and Children —

The enquiry under yd head, renders it necessary to consider y distinction between legitimate and illegitimate children for y rights and duties are different, when refered to these two classes of children —

First, Then Who are legitimate and who bastards children? A legitimate, ~~one~~ child is defined to be one, born in lawful wedlock, or within a competent time afterwards —
1 Bl. 445. Co Litt 244. Cro J. 541. If. no other yn a child thus born can be legitimate. But it ant universally & converso, that every child thus born is legitimate, tho' prima facie he certainly is — 1. P. D. 488. 5. Co 98. B. 1. Bl. 455. Str 955.

69. An illegitimate child is deemed to be one, born or begotten out of lawful wedlock. In other words, not not begotten or born during lawful wedlock, 1. Bl. 454.
This definition, I conceive, is incomplete, for suppose yt

yr after yr conception, yr parents intermarry, and yt yr father die before yr birth, yr child is illegitimate, according to yr above definition of a legitimate child.

The true definition is, yt an illegitimate child is one begotten out of lawful wedlock, and not born during either lawful wedlock, or within a competent time, post or one neither begotten nor born in lawful wedlock, nor within a competent time afterwards.

10. The above definition of a legitimate child, amt only to yo, yt if a child is born during lawful wedlock, ye presumption is, yt he is legitimate. He is prima facie so.

The presumption is very strong, Hence ancently no other proof of illegitimacy was allowed, in such a case, than such as rendered legitimacy impossible, and yr fact of illegitimacy cd be proved only in two ways, 1. First. by showing impossibility of access, to yr wife of yr husband, Second by showing his impotency.

Co Litt 244. a. 5. B. 98. Co. 1. 6. 940. Salk 123. 1. Ld. Ray.

Improbability however strong, was not, rates to prove yr fact.

Cro Ch. 483.

First. no other proof of nonaccess was admitted formerly, yn yt of yr husband's absence, "extra Quartum Mariæ" from yr time of conception to yr birth. Co Litt 244. 1 Roll 358. Salk 120. 122. 3. 1 H. 11.

488.

Absence within yr realm want legally provable.

vide Salk. 1886 457. Salk 122.

These are all absent.

Hence if yr husband had been absent any length of time, and his wife shd have a child, however soon after his return, yr child wd have been legitimate, unless yr husband was proved impotent.

So if after an absence beyond seas, for 20. yrs, he shd return, and many a woman, who shd be delivered next day, yr child wd have been legitimate, unless (at Suprow) Co Litt 244. a. Salk 122. 484. 2. Roll 785.

72. 2P. As to Husband's impotency. Formerly ye fact could not be proved otherwise yn by want of age.

According to some, ye age of Impotency is any age under 14. According to others, ye age of 8. is ye limit.

The evi admissible under these rules, is supposed to prove ye impossibility of Legitimacy.
No Rules similar to ye above have been adopted in Comt, and these old rules are now abolished in ~~Comt~~ England

First. Nonaccess, may now be proved by other Evi, yn yt of absence, extra quatuor Seas, The question is left to ye Jury under ye Special circumstances of ye case. and they may find nonaccess. tho. ye husband has been within ye Realm.
1 Salk 27. 5 Mod 419. Str 826. Esp 2. 484.

73. Second. Impotency may also be proved by other Evi, yn want of age, &c. as by ye husband's state of health by any Evi, in short, wh conduces to prove ye fact.

These Rules, however, also seem to admit no other proof of illegitimacy, yn what amts to an apparent impossibility &c.

+ 1 Bl 350. Cow. 584. Evi. D. 484. It has been lately settled, yt other Evi yn yt of nonaccess, and impotency, is admissible to prove illegitimacy, as yt ye Mother cohabited with another, and yt ye child was reputed a Bastard, yt it was called by ye name of another, and yt ye mother took his ~~name~~ name &c.

74. This evi goes to prove, improbability only yt ye child, is legitimate. It ain't direct proof of nonaccess or Impotency.

The Issue of ye marriage, wh is null "ab initio" is illegitimate. 1 Bl. 439. n. + 440. 5th. ye in case of Total Divorce. for causes existing before marriage and rendering it unlawful.
Rol 357. 360

But y legality of a marriage not absolutely nulle and void, can be called in question, only during y lives of y Parties, pro salute animarum, yt is y case with those marriages wh are made void by reason of some canonical impediment and y reason is, divorces are granted and marriages annulled in y Spiritual Ct, "pro salute animarum" but yt cant be when one is dead, This rule is confined to those marriages, wh are unlawful by reason of some canonical impediment &c. where divorces are necessary to prove y illegitimacy, wh are necessary only in cases of canonical impediments -

In civil disabilities, legitimacy may be denied at any time, Issue born during wedlock, cant be bastardized &c. by proof of illegality of y marriage, after y death of either y Parties. But a child may be proved actually illegitimate after y death of its parents, tho' born during lawful wedlock, by other causes, as is frequently done -

A child begotten and born after a divorce, "a mensa et thoro" is presumed to be illegitimate, because y Parties are presumed to have conformed to y decree, wh was to live seperate, and wh prohibited em from cohabiting together. But where there is a voluntary seperation by hus and wife, under articles of seperation, if a child is born, tis presumed to be legitimate, because there is no presumption of yt conformity to their own voluntary agreement, But in both cases y presumption may be rebutted -

When y question of legitimacy depends upon yt of non access &c. or non access, y wife ant permitted to prove non access - This rule, says Ld Mansfield, is founded in decency, morality and policy - It is. Says Mfld. vs y policy of y Law. because it might offend y husband, It may be proved, however by a testimony of others, But she is admitted and good witness to prove her incontinency with others and yt arises from y necessity of y case, for she may be y only person acquainted with y

(Mis 340.

Bull n. P. 113.

fact, tamen y rule of decency and morality -

But y husband and wife are competent witnesses, to prove y time of y child's birth. So they are competent witnesses to prove y time of marriage - and y fact of marriage

To y declarations of y father and mother as to y child's being being born fore y marriage, may be proved after their deaths - This ant bastardizing one so born during wedlock nor does it impeach y marriage of Parents.

6. To an y either in Chancery or good Evi of y Fact.

To tradition, common reputation, an entry in a family Bible, inscription on a coin-stone are y best Evi of y child's birth. as they are upon questions of Pedigree -

By y Civil and Canon Laws, a child born before marriage is legitimated by y subsequent intermarriage of y Parents - not so by y Com Law nor by our own -

6. Co. 65. 1. Ab. 454. 56. 1. Rol. 524.

As all children born of a widow, so long after y husband's death, yt by y usual course of gestation, they can't be his issue, are Bastards - They ant born within a competent time after marriage -

1. Ab. 56. Cro. C. 541.

11. What is y competent time mentioned in y definition, y Law dont exactly ascertain, I.E. within what time after y husband's death a child must be born, to be legitimate -

Plata one spoken, 9 Solon mts and ten days, is y usual time of gestation, I.E. allowing 30 mth days to y month, 200. days, or averaging y mths of a year, 285 days, Plata others 40. weeks, 280 days.

2d Coke says 9 mts or 40 weeks, ye farthest limit 78. Co Litt 123. n. B. This subject within a few years since has been examined by eminent physicians. Its agreed yt ye usual time may be hastened or prolonged by various causes. 1. Rolle 356. 2 B. 541. 1. Bl 456. Pa. n. 9. Co Litt 123. B. n. 1. 2.

The rule is yt a child born within ye usual period of gestation, computing from ye husband's death, is legitimate, 1E. presumed to be so, as if born during wedlock — Infra

A child born after ye expiration of yt period is presumed illegitimate. But ye presumption may be rebutted in both cases. Co R. 541. 1. Rolle 1 Bl 456. vide Palm. 9. Co Litt 8. 357. Bull. N P. 114. Eb D. 485.

But one born 9 mths and fourteen days post, has been held legitimate, ye mother having suffered much hardship, Co one born 9 mths and 20 days, after, under special circumstances.

If a woman widow marry immediately on ye husband's death, and a child is born within such a time, yt according to ye usual course of gestation, it may be ye child of either husband, he or she, may, when of ye age of discretion, choose either to be his or her father. 1. Bl. 456. Co Litt 8. 1. Rolle. 357.

[illegible]

But he cant [illegible] satisfactory Evi of his true Parentage can be obtained. The rule supposes ye absence of any other proof yn wh is furnished by ye facts supposed in ye statute.

Its said yt one may not be bastardized (1E. proved to have been a Bastard) after his own death, as "personal defects die with ye Person — 1. Bac. 315. 315. Co Litt 33. a. 245.

But yt holds only as between a Bastard Eigne and Mulier puisney, 1E. between a son born before ye marriage of his Parents, and ye lawful Issue of ye Marriage — Salk 120. Eb D. 486. 3 Ev. 410. 1. Bac. 315.

80. Bastardizing by impeaching a void or voidable marriage is a distinct thing. ante 74.

If men a Bastard Eigne, enters upon his fathers estate, and dies seised, his issue shall hold to y exclusion of y Mulier. Bac 315.

But to exclude y Mulier Puisne, there must have been an uninterrupted possession by y Eigne, and a descent to his Issue. Hence during his life, y legitimate son or Mulier Puisne may evict him.

And if y legitimate son die without Issue, y estate goes to y Mulier Puisne, or legitimate son, even in exclusion of a posthumous ~~child~~ child by y Bastard eigne. Because y possession wasnt in y posthumous child —

Of the Rights and Incapacities of Bastards.

The rights of an illegitimate child, are such only as he may acquire, for being filius nullius or filius populi" he ant of Kin, to sace, to any one but his own Issue. as it respects inheritance and ergo can Inherit nothing.

81. But y maxim, yt he is Filius Nullius, doint hold as to all purposes, for it doint hold as to a marriage within y prohibited degrees, an Illegitimate child cant marry his mother, or daughter &c — 5. Mod. 58. Ld Ray 58. Comb. 365. Com. R. 2. 1. Bl. 458.

Nor does y Maxim extend to cases, in wch y Law requires y consent of y Father or Mother to a marriage of y child — Here y Law recognizes y relation of Par and child — Concerning y consent of the Father of a minor illegitimate child is necessary to his marriage, when he is known, by being compelled to support it. 1. T R 96. 100.

or — yo. — 1st 1 ov ay y v.

It is said yt a mothers consent is necessary, but yt seems not sans. Her consent has often of late been held void by Sir Wm Scot and other civilians. Judge of yt act of y Bishop of London. 22. Christian Forever 580. 1. Hagard 337.

1. Bl. Com. 458. n. 11. 11. East 1.

Indeed y Maxim of nullius filius, seems to apply to y Law 1. Bac. Abr. of Inheritance. Justice Bulel (1. T R 11.) said by Littleton, (Bl. 458. n. 2.) yt a Bastard is quasi, nullius filius, because he can't inherit

3. q. 8. 2 F. 1 8 — C. Litt 123. Litt Sec. 1. 88.

A Bastard may acquire a Surname by reputation, tho' 82.
he has none by Inheritance —
A Bastard may purchase by his name thus acquired, as by y name of Bently Hazel, he having gained y reputation of being Bently Hazel's Son — Vide Infra.

Sham

By description of "Issue" a Bastard can never take, as it seems, (Co Litt 3. B) because P purpose "Issue" is generally used as synonymous with "heir of y body" and he cant be Heir in any sense. 1. Atk 410. 6. Co 65. Pow. 2. 319. 333. Perk 8 S. 25. (Co Litt 3 B) 2. Sw. 404 — "Vide Devise 9"
But a Bastard can't gain a Surname by Reputation, or y reputation of being child to B H. but by continuance of Time —

Hence if a contingent remainder is limited to y eldest son, 83.
of B H. (he having none at y time) an legitimate or illegitimate, and he has afterwards an illegitimate son, he can't take for he hath y reputation of being y sons of B H. at his birth, and his uncertain an he ever will. The contingency is therefore too remote.

But it has been said yt such a limitation of contingent remainder limited to y elder son of B H. will enure to him — or her Bastard son post born, because he acquired y denomination of of her child by being born of her. so that there ain't never

any uncertainty as y person intended

If uncertainty in y person is y only objection, it seems obviated in yd. good and y limitation would be good —

84. Ced Quere, If ant limited on too broad a contingency, allowing there ant any uncertainty as to y husband, of y husband, when born: is not y future birth of y bastard its self, y "remotissima potentia"?
Plargrave leaves it "in dubio", tho' from his note, y better opinion seems to be vs. y ofs limitation.

A bastard can have no heirs, but those of his own body — for all other kindred must be traced to a common ancestor and he has none. P. of C. S. P. 8.
1. Bl. 459. Co Litt 3. B

In Eng. a bastards settlement is regularly in y Parish in wh he is born, He cant obtain a derivative settlement — for yo is a species of Inheritance. 1. Bl. 162. 3. 459.
Salk 427.

If y child lives with its mother for nurture in another parish, still y former parish must support it.
Doug. 7.

85. There is an exception to y last rule, where a fraud is practised on the Parish in wh y child is born — as If y mother is sent by order of a Justice, to a Parish to wh she dont belong, and there is delivered, y child is settled in y Parish from wh y mother was illegally removed. Salk

So If y mother goes to such a Parish, and is taken up for vagrancy and has a child born there, tis settled in y Parish to wh she belongs.
In Court, y mothers settlement is yt of y child —
Post 152.

Of the Duty of Parents to their Damned Bastards.

The duty of Parents to such children consists chiefly in their obligation to maintain them. As to the modes of enforcing yd duty in Eng. see Bac. 1. Bl. 40. 1 Bac 317.

For the relation of Parent and child is not regarded to purposes purely civil, yet as to certain natural duties.

The law on yd subject in Eng depends upon the Sts of 43 Eliz. 3 Ch. 1. 13. 14 Ch 2. 6 Geo 1.

In Penn as in Eng, the Putative father and mother are both chargeable for the child's support. 1 Bl 458.

The Mode of Proceeding.

On complaint made to a magistrate by the mother, under oath, he issues a warrant to apprehend the person charged — & he is brought before the Magistrate, who enquires as to the truth of the charge, and in his discretion, may bind over the person charged, to the next county Ct, (of the County in which the child is born) for trial. The county having penal jurisdiction of the crime, he ought to bind over, nisi the prosecution seems wholly groundless. 1. Hub 267. 1. Hub 267.

On yd enquiry as on the Penal Trial, the mother is allowed to testify as "necessitate rei"

The Process issued by a magistrate, is a Capias ad respondendum, the form of the prosecution is criminal, tho' the object is civil.

88. It was once generally supposed, that the complaint must be made before the birth, or the mother has no remedy — It has been decided Contra.

The mothers oath not conclusive, but ex proprio Facie Evi, and of course throws the burden of proof on the Def. The Def's denial by plea, int of any avail as her oath, but he may contradict or invalidate by other Evi, as in other cases — 1. Root 107.

She must also be put to y discovery of y truth in y time of her Trial. It avails.

89. The omission of y last requisite can be supplied by no other Evi.

Facus when y Select men of y town Prosecute, or y town ind be at y mercy of y mother and y consequence ind be accumpsori between y Father and mother—

If y state y select men have y same power to prosecute, as y Parish in Eng, but tis more usual for y mother herself to complain.

The St requires y the mother continue constant in her accusations, she must not change one before y magistrate and another before y County Ct. "continuing constant has been decided to be a "prerequisite" tis necessary to be alledged in y complaint, it aint mere Evi, tis absolutely necessary, and even y confession of y Father out of Ct, aint safe, because there is a presumption of Law wh cant be rebutted. P Reeve Contra.

90. If y Def is found to be y substitute father, y Judgment is, yt he find sureties for y payment of y damages assessed and also, (if it be required) to save y town free from y charge for its maintenance* and if he refuse to obey yr order, he is to stand committed. St Comnt 54. when y mother sues— when y Nation sues, he only indemnifies y town. This Judgment is called In Eng. an order of Filiation— 1 Comns B 417.

also such security is not required of y mother, because she would be obliged (in all probability) to go to prison—

But y order to stand committed has often been mistaken in Comnt. & y consequence has been judges no Prior—. But in these Counties are Issued quarterly—

The damages given Take Court practice, are usually for the support of the child, till it is 4 or 5 yrs old, together with the child bed expenses. Bail 2 Y. Juris as to these expenses.

Cumstock vs Alex. Cole. 5 Mass 5. T. 2. 30. 155.

But the period for the damages are to cease, are not uniform. If the child die before the separation of the Term Fines, the subsequent executions are stayed.

On the other hand, if the expences exceed the damages, the father is compelled to buy more, and the necessary additions will be inserted in the remaining executions. on application to the County Ct.

If the child isn't born before the rising of the County Ct, the wife of the Def is bound, the Ct will order a continuance and renewal of the bond.

If the woman die, or marry before delivery, or suffers an abortion, the Def is discharged — If she marry before the recovery, the husband cant join in the prosecution. Sed Quere. 1 Cc. 58.

The bond in recognizance taken by the magistrate is considered to be void on Def's appearing &c. and answering final judgment. Wit 217.

In the case the recognit isn't discharged under the Ct in the limitations as to Bail, till a year has elapsed from the time fixed for the last quarterly payment.

If the mother don't prosecute, the select men in behalf of the interests in subrogate & the child may prosecute for the Town and oblige the Father to give security to save the Town from charge, or he voluntarily does it for them, prosecution will be unnecessary. The Select men may make a Special agreement with him

In Court if she prosecute and fail to pursue it, y select men may pursue y same prosecution.

93. If y putative father, after Judgmt vs him, don't find security to maintain y child (if so required) and to save y town harmless, and free from charge, he is committed also as a criminal in Court. The poor prisoners rate not allowed him.

What y mother has sworn on her examination, before y magistrate, is good Evi, after her death in support of an order of Filiation. 5 C.R. 373.

But in County where y Co Ct, (she being dead) admitted her deposition, taken before proceeds issued, and also y Evi of y magistrate, as to what she testified before him — y Judgmt was reversed — Quere. was not y Evi of y Magistrate legal? Keb. 259.

Quere an on a prosecution by y Select men, y mother is compellable to testify who y father? Why not? The Evi not to disclose a crime on her part, wch wd be seen unknown, but to ascertain who was concerned with her in it. Decided by Sup Ct and Ct of Errors in Connt, she is compellable. 1 Ld Ray 8. 1. Bl. 458.

She aint found by y Com Law, but by our Connt St In Eng. she aint compellable to testify till a month after her delivery — 1. Bl 458.

In Connt, Supreme Ct, reversed y decision of y County Ct, wch was yt y mother was not compellable on her own prosecution to answer relative to her intimacy with other men — 1802.

95. Trial of these prosecutions was originally by y Ct only and yt is still y practice.

Depositions are in such cases in Connt, are admitted

as Ei, tho' they are modo impossible in Co, purely criminal, this is of a mixed character—

But in Connt, y Rule as to Criminal prosecutions, obtains with regard to y right of Retreat. There is no appeal from y County Ct to y supreme Ct, in criminal cases. So in prosecuting on y St. This was y old Rule, post appeals were allowed,— But they ant allowed now—

The Rights and Duties of Parents in relation to their Legitimate Children, and vice versa— 96.

1. The duties of Parents towards such children, consist principally in three particulars. viz maintenance— Protection and Education— 1 Bl. 446.

The duty of maintenance is founded in natural law; those who have given life, ought to preserve it as far as they are able— Maintenance consists in providing necessaries. This duty is of reciprocal. 1. Ho. 453. Ray. 500. 1. Bla 446.7.

The obligation of Parents to support their Infant children is absolute and unconditional, in so far as they may be entitled to assistance from y Parish in Eng, or in y Town in Connt. by St. Infants in judgmt of Law cant support themselves— 1. Bes 100 but only when y Parents are unable. 1 Bl 449. 1. Ch. Ch. 238. 387. 3 Atk 339. 3 Day 37.

2. The duty is enforced in Eng by St 43. Eliz, and in Ch Connt by a similar St. 1 Bl. 448... &c.

This obligation under these Sts, extends as well to Grand Parents, as to Parents, and it doit cease with y Infancy of y children &c. for by these Sts, all persons who are poor, infirm and unable, (wt want of understanding, age or infirmity) to support themselves, shd be supported by their Parents or Grand Parents, if able— 1 Bl 449

The law always deems Infants unable to support themselves— (ut Supra) Bl 448-9. Stra 30.

L V. 21 — 2

In England, children are under ye same obligation, but
Stile 388 3. Quere as to ye Grand children, it seems ye obligation doth
extend to ye latter. 2. Paul's. 345. 1. Ld. 453. 454. Str 195.
The obligations in Town here and Parish in Eng, to support
Paupers, is only secondary, yt of ye Parents etc, and yt of
ye children being Primary.

12. Grand Parents ain't liable, if ye pauper has Parents, who
are able to support him. So ye Grand children ain't liable
if ye children are able.
Suppose ye Parents able, to afford only a partial support
are not ye Grand ~~children~~ Parents bound to contribute. I think they
are, for hata ye Spirit of ye Law, ye town ain't liable, in
ye cases where there neither Parents nor Grand Parents,
of sufficient ability.

100. In Eng a man ain't bound to support his wifes children,
by a former marriage, even during coverture, and no question
is made as to ye wifes ability at ye time of marriage,
The St of 43. of Eliz extending only to natural relations
or relations of consanguinity. Prest 143. 53. 2. La Ray 1454.
and not relations by affinity. 3 Esh Rep 1. 4 T.R. 119. Str 190.
Str 955. 2. Ben 353. 1 Selw. N.P. 296. 1. Bos Pny 268.
and maintenance by ye second husband is a crime
of ye widow, when they attain full age is redy ye evidence,
4. East 76. 1. Selw. 297.
The Eng. construction of ye St on ye subject, appears to me the
correct one. But an ye rule (founded upon ye construction
in relation to ye particular case in question is so? So
not ye true principle in this? yt ye husband is bound
(having of ability) if ye wife was of ability, so he takes
her "cum onere" otherwise not. 1. Str. 448. Str 283.
This is ye rule as laid down by Hb. for says the
Husband takes ye lands with wh the was bound to
support ym — I ye think yt natural, but surely
not Law

The St. indeed, dont so I suppose, subject y subsequent Wife husband, as extending to him, nor does it immediately affect him at all — But if subjected, (y mother being Pauper) absolutely and upon gen. principles, y obligation seems by consequence to devolve upon him —

Clearly a man ant bound either in Eng or Amrc to support his wifes Parents, y Priuge of y Law provides it, takes her die, ett intus [illegible] — Sir 1 Sid. E. Rule. 340.
Where ought not her property to be liable, if she had bound.?

So one ant bound to support his sons wife, after a "Divorce a Mensa et Thoro".
In case of no Divorce, I don't find it expressed, how far Parents are bound to support a Son's wife I believe they are bound to support y Son and his child, and I think, his wife also — I think, supporting him, is supporting her —

Suppose a Pauper has children and Parents able to support him, who are liable, Parents or children or both?
Ant y burden devolves in such case —

But yo duty to support children, don't disable any one 1 Vez. 102.
from disinheriting his children by will, either in Eng or here. and they cant resort to his devise —
as to y mode of enforcing yo reciprocal duty in Eng — see
1. Ve. 448. 1. Bro 449. 450.
In Connt y obligation is enforced vs y children, and 1 Root 60
y Parents of adull children, by application in y form of 2 Bro. 168.
a memorial to y ~~Cts~~ County Ct in y County in wch
y Pauper lives.

An action at the Law, as upon it, will not lie — for y duty ant absolute, but depends in necessity on y one side and ability on y other —

103. But for necessaries to be furnished for minor children, an action at the Law lies, here y duty is absolute —
3 Eob. R. 1. 2. 5. 13 John 480.
on Court y application as children and y Parents of adult children, may be made by any one of such relations, y Persons as are within y Act or by y select men of y town —

On y Memorial (Petition) all y parties concerned, male and Female, are cited before y Court and y Sentence of maintainance, is apportioned according to their respective abilities to pay, not without an eye how much each may have received of y Family Estate —

Relations when adjudged are required to give security to abide by and perform y order: If y security ant given y Court issues quarterly executions vs y relations in y name of y Memorialist — Fol. — 1. M 12 — N. 1. 9. M

104. Second: The duty of protecting children —

This duty is also founded on natural Law (and on Moral law) but tis rather permitted y n enjoined by Municipal Laws. 1. Bl. 450.
Thus a Parent may maintain and uphold a child in Law suits, with incurring y guilt of maintainance quarrels.

1. Bl. 450. So a Parent may justify a battery in defence in his child
1. McAuk 83. Cro E. 296 (E. he may use y same violence wh y child himself might — So e converso, a child may maintain and uphold his parents in Suits, and may justify a battery in his defence

3. The Duty of Educating Children.

Parents are bound to give their children a suitable education. This is a natural duty. 1 Pb ~~[illegible]~~ 450. 1. .426.

There is no provision in Law to enforce, as the law in Canada, that children may be sent to school, and are diseased, and in India, and if parents are forbidden to send children abroad to be educated in Popish Religion.

In Connt all Parents and masters are required to teach children under their care, and bring the ability, to read the Orders of the Church of England, and Catechism without fences, and if unable to do so, to teach them some trade or occupation. and in case of neglect are subject to a Fine.

In Connt Select men are authorised to take children from parents neglecting their education. so yt they become rude stubborn and unruly) and to place them under or to bind them to Masters, yt they may be employed and trained and suitably instructed. Males. till 21. Females till 18.

The duties of children to Parents consist in their obeying the obey and be subject to them during their Lives. to support them (ut Supra) to support them if poor, and protect them when necessary. (ut Supra) 1 Pb. 450. 3. 4.

II The Rights and Powers of Parents.

First. The Parent has a right to direct the mind children to a religious education, it appears to be a duty — the Parents duty, for it is to be found to educate them, or must answer to God for them.

1 Sanders 130. 1. Pb 452.

Id. — Parsons said, a Father had for a time a power over his children [illegible]

But if the Parents conduct be grounds of moderation or reason, it will be in the best of manner, which may [illegible] 1 Sanders Reeves 65. 73. 74.

in him, by [illegible] time. But, if a person doing in a proper manner discretionary, he not liable for slightly exceeding the limit prescribed in the rule, nor for any mere error of judgment as to the proper degree of correction. It seems there must be unreasonable correction and malice to subject the Parent –

108. This power of correction may be delegated by the father to a Master, the father then, is to his right and duty, "in loco parentis" 1. Bl. 453.

2. The consent of the Parent to the marriage of his child under age, is also required by the Eng and Comm Law – 1. Bl. 452.

Without such consent the marriage is void in Eng – And By the Comm Law, the marriage is good, but the clergyman who married them is punishable with Fine – Comm L. 236.

A Father has no power over his Infant child's estate, does not stand a Trustee or Guardian, he is liable to account when the child is free or the trade may be, before –

Q. A minor is entitled to all the property, he may acquire, Earnings of service, as by Gift, Grant &c. But the father is entitled to whatever his child acquires by service – for he is Servant to his Father – 1. Bl 452.3 –

Hence a Parent is entitled to sue and be so any
1. Bl 453. one who has injured or beaten his child, so as to cause a loss of service, as in the case of a Servant –

3 Coll 13. 1. Bl. 453. Esb. 645.

So the Parent is entitled to an action "per quod" for enticing away his Minor child –

Ill. So if an Infant has been sealer, or otherwise injured, he himself is entitled to damages, for the immediate personal injury –

Ro Elz 55. Esb D. 645.

Ray 253. And if the Parent has incurred any actual expence
3 Mils 18. in consequence of the Injury done the child, as in the case of a wound, he may recover the also in his action, if specially

laid as ground of damages –

So an action lies for a Parent, if any one, seduce his
his daughter, "per quod" [illegible] ground of the
action. It extends not, [illegible] Immediate ground
of action. It would seem, no action lies – La Ray. 1032. Esp D. 645.
2. T R. 168. 11. East 24. 2 Selw. 1083.
Master and Servant 6. 5.

[illegible] Supreme Ct on a suit by a 11.
Guardian for taking away his Ward –

The expence incurred by a Parent during a daughter's [illegible]
may also be recovered if special laid. 3 Wilson. 18. Ray 259.
But a loss of service is not a real, nor a principal ground
of damages. The real ground of damages, is a wounded feeling
of a Parent, one of dignity of a family – 3 Wils 13. Esp D. 645.
Title Evi. 5. 11. East 23. 2 Selw. 1037.
For Gust. Evi of a daughter's loss of service, is valu, & ant
necessary, yet damages to be in any manner proportioned to
loss of service – 2. T R. 168.

As 2d Remoir has lately holden, it need not be proved
to have actually served a Father, i.e. actually laboured for him,
Dos satis, if she live in his family, as a subordinate member,
& it may yet seem to me correct. For she is then deemed his
Servant, subject to his commands & yet he has a right to
her services. Enough, if he has a right to demand her
Service. Pea R. 55. 233 –

Second. It lies, tho' a daughter in a bermaing receive, is a [illegible]
of a Parent and of no [illegible] as of a nobleman's daughter

3. The character of a daughter determines in a great measure a
quantity of damages, and Evi of her intimacy with other men
goes to mitigate damages – 1 Stark 472 –

134.

[illegible] in [illegible], unless y [illegible] dont have evidence, [illegible] notwithstanding [illegible] o service, when she was in [illegible] as in case of a Prostitute –

11[illegible]. So in Eng where y Father has allowed y Def (he being a married man) to visit his daughter – Pea Ca. 240. 39. Bull N.P. 27.

But still it has been holden, both in old and modern cases, yt y action dont lie, unless y daughter is in some way proved to have been a servant to y Pltf. 3 Burr 1879. Ld Ray 1072. Bulstr. 373. Cro Eliz. 769. 770. 2 T.R. 168. 6 Mod 127.

114. The age of y daughter aint material, if she acted as servant to y Parent when y Injury was done, or lived with him. (at Suit) There is one example of y age of 30, nor is a contract of Service necessary in such a case, for she aint considered as emancipated. Post 118. 56. 3 Wils 18. 2 T.R. 166.
1. East 526. 2. Do. 276. 2. Selw. 1084. 6. T.R. 252. 2. Selw. 1084 –

But if under age, she is y Servant of y Parent, of course as I conceive, unless she serves another without wages, & receives them herself. 5 East 45. Selw. 1084. 9 John 387

T.G. thinks, The Parent may have an action, always, unless some one else is entitled to it as Master –

Q.

'Tis said by Esp. 645. yt y daughter shd be resident in y Fathers house, at y time of y injury done, he cites in support of his opinion, 3 Burr 1897. or 8. Quere in all cases. Suppose her Infant at a boarding school, or serving in anothers family for y benefit of y Parent. The rule, say T.G. is expressed too generally –

3 Burr 1878 not 1897 –

If y daughter be an adult, so, a residence, what is tantamount, (or it, as serving another for y fathers benefit) might be said to entitle y Father to y action. If an adult, yt may perhaps be necessary, because she wd not otherwise be a Servant. So was y case 3 Burr. 1878.

645.

It is said in 1 W.B. 64.5. to have been thus decided by Lord Mansfield in 3 Burr. 1.8. yet he must be a Minor — he doubt here so, nor is y Law so, ante —

Trespass will lie for plundering in his house as an unl. lb. so for a Minor. 2. TR 4. 11. East 22. Poa 55.

Even any parent can sue alone when y daughter is under a minor age not under y care and control of y Parent? I.e. it must always be in favour of y Parent.

In Tres action, y daughter herself is a competent witness, for she will interest in y event, 3 Mils 18. 1 Mont 472. I think, she can't be compelled to testify — Tille Evi 166.

An action merely for producing Pl. substantial in action on y case — These belong Infra

1 3 Wilson 18. 3 Burr. vide Infra —
2 TR. 4. 2 Ld Poa R 235. 187. 476. 2 Selwin 1084.

But in Eng. y action is in Form, Trespass vi et armis — but 116. These
yet seems incorrect on principle, tho' supported by practice and precedent. belong Infra.
vide Sub. (1. Selw. 913. Ld Ray 1117. 1032. 2 TR. 167. 2. Ld R. 482.
6 East 388. 5 TR 361. or 186.

When y Def. was legally entitled y house of Pltf. he may sue for breaking and entering his house. and can a deduction or aggravation, it is a ground of consequential damage. 3 TR. 292. Ld Ray 1032. 2 TR 167.8. Salk 206.
2. Wils 313. 3 Do. 20. 1. H Bl. 555.

Here y action will is in Form and substance. Trespass, y gist of it being unlawful breaking of y house, here y form is doubtless right on principle —

But if Trespass "vi et armis" is not, a licence to enter y house defeat it, it is a licence to enter. Entering y house being y ground of y action, and y rest being only aggravation. In Eng. it must be pleaded, being a Confession not so in Court, under y Ist of Pleadings — 2. T.R. 16.

Plata Swift. 2. Ins. 64) a licence is no defence so a subsequent wrong makes one a Trespasser ab initio. This is incorrect — a licence must not given by Law. If given by law, y rule will be right, as in y case of Ch. entering to take distress, licence to enter a tavern —

136.

[illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

3 Bl 140 [illegible] or other special damage [illegible] [illegible] [illegible] [illegible] [illegible], some say

Cro Eliz 770. a Parent has an interest in ye child & a [illegible] for his education.* [illegible]

3 Co. 38. B. [illegible] opinions are contradictory, [illegible] [illegible] [illegible] at Law [illegible]

3 Burr 1878.80 in [illegible] case father by ye Feudal Law, is entitled to ye value of ye heir's marriage—

Sicheirbert. 90.260 wh he might lose by ~~ab~~ abduction — ys last is correct.

* I think it [illegible] lie in ys case, ye right [illegible] such an one as ye [illegible] [illegible] damage &c.

18. [illegible] in Connt, indeed, all ye children are heirs apparent, but a feudal [illegible] never existed here, [illegible] [illegible].

[illegible] The authority of ye father ceases when ye child is 21. Bl. 453. 1. Bl 453.

[illegible] He is then emancipated, i.e. has an exemption from parental control—

[illegible] But he may continue a servant de facto witht any contract as ye [illegible]

East 520. [illegible], as is often ye case, and while he so continues, there is no total

2. [illegible] 252. exemption — emancipation — Ante 114. Post 150 — 5 TR. 252. 1 East 526. 2. Do 276.

The mother as such has during ye father's life no authority. when

Bl 453 5 E. [illegible] he [illegible], she is supposed to do it with ye father's consent—

How far a Parent is liable for Childrens acts—

II First. he is liable for their Torts. (they being minors under his care) to ye same extent as that a master is liable for ye acts of his servant. He is liable as master [illegible] that and &c. [illegible]

[illegible] 2d. So he is [illegible] otherwise liable on their contracts yn masters are on their [illegible] in ye case of contracts for necessaries, at ante Mas. & Ser—

The father is liable as master in all cases, not for necessaries, here ye relation [illegible] [illegible] of Par and Child exists—

3. By ye Connt St. in certain cases ye father is obliged to pay fines imposed on his Infant children — as Sabbath breaking — not working on highway not doing military duty—

Remark. There is generally a mistaken Idea as to Parents liability for his children — he is not liable for his child's breaking neighbours window, as supposed generally, but only when he wd be liable for ye same act committed by a servant.

Finis, Parent and Child—

Master and Servant.

Servant

A subject is one, who is subject to y Personal authority of another — not to y public official authority of another — This is meant to touch Dr. Adams —

A master is one who exercises y authority — The authority is personal — Subjection to Civil authority ant Servitude —

The authority exercised by y master, is generally by virtue of compact with y Servant or his Guardian, but not always — This in case of slaves, it ant — such as exists at y South —

The Kinds of Servants in Comnt are 5. Where slavery ant known there are but four —

1. Slaves. 2. Apprentices. 3. Menial Servants — 4th Day Labourers. 5. agents of any kind, as Factors, Brokers, Stewards, Bailiffs, Shipmasters — Attorneys, Loft 1. — 1 Bl. C 423.7. 1 Modes. 464. 469. 2 Salk 666.

The First three kinds are unknown to y Law of England —

First. Slaves. It is doubted by many an slavery is legalized in Comnt — By y Law it ant, but it has been by custom — And if legitimate slavery exists, it must be sent on Natural Law — y Comn Law or our own Local Laws —

First. According to Natural Law — Slavery must be authorized of authorized at all by a State of Captivity in war — by contract, or by birth. Ho. gives a negative kind of Birthright — i.e. by being born a Slave — 1 Burlamaqui 214.13. 1. Bl 424.3. nnn.

I. By Capturing — It has been said, y captor has a right to kill his captive and therefore to enslave him — But by y Law of nature, as explained by y best authority and as recognized by y practice of y Mod. Civilized world, yd right to kill dont exist, ni in case of necessity in self defence,

and in y case of actual capture, yo necessity cant exist in favour of y Captor –

II. By Contract This cant be y foundation of Strict Slavery, wh implies an absolute right over y life, property and liberty of y Slave –

A man has no right to dispose of his own life – Ergo he can confer no such right on another –

So he cant make an absolute Sale of his Liberty, For yo no implies an obligation to every unlawful commands and destroy his Freeagency, and as after such a contract, he can have no right of property, there can be no consideration for such a Sale, Ex "Ex nihilo nihil fit" Therefore y contract dont rest on principles of the Law –

But a contract to serve another is good, yo is nothing but a Sale of ones labour.

III. By Birth, This supposes y slavery of ones parents created in of y other last mentioned ways, and ergo y foundation of y claim fails –

Second – The Law dont recognise any species of private slavery, nor can y Local laws of any country be enforced in Eng. in favour of Slavery –

Co Litt 79. B. n. Indeed a Foreign Slave becomes Free on landing in England – 18. he is protected in y rights of Personal Liberty Personal Security – and Private Property – Salk 424. 666. Lofft 1

Litt S. 189. 104 204 2 Bl 94. There were in England under y Feudal System, what were called villeins, but they were never absolute Slaves – The Lord could maim or kill them – This species of slavery arose from y Feudal Tenure of Villenage –

But there are no Feudal villeins in England now — for y Tenure in Villenage was virtually abolished by y St 12. Ch. 2d and at y time, it is said, yt there were but 2. villeins in England — 2. BL. 96. Loft 8.

Indeed y character was hardly known in Eng. in y Reign of Elci. 3. Hum. 307.

Third. By our Local Laws a qualified slavery, I conceive, is legalized — We have no St expressly authorizing y holding of Slaves, but we have St counting upon y existence of Slavery and making provision exclusively for Slaves — As to y irregular conduct of Slaves — providing particular punishmts. for crimes committed by them, obliging Masters to maintain emancipated Slaves — providing y mode of Emancipation, to exonerate y Masters —

Long acquiescence of y Legislature in y known practice of holding Slaves, furnishes also a strong argumt in support of yo opinion —

Besides this, I think it has sovereign sanction yt Slavery is legalized here, and yo doctrine is established by Judicial Decisions — 2. Root 364. 517.

Thus it has been decided by y Sup Ct, yt a Master cant maintain Trover, for y Servant — it has also been determined yt a Slave may be sold or taken on Execution — 2. Ld Ray 1074. 3 Keb 785. 2. Lev. 201. Salk 666.

The reason in y first case, is, yt a Slave is not a subject in wh an absolute property can exist, any more yn in a child or apprentice, since y person or body of y Slave is not y Master's property, tho y services are, Hence, it follows, yt an action for taking away a Slave, must be y same as for taking away y apprentice — (of wh. Post) Salk 666.

But since absolute slavery never existed in Connt –
For y Master has clearly never had any power over y
Slave's life – And it has been settled yt a Slave may
hold property and sue for it by his next Friend –
He may sue his master –

It has also been decided by y Superior Ct, yt y marriage of y
Slave with consent of y Master, is an emancipation – Because
he thus contracts with y Master's consent, a relation thought
to be inconsistent with a state of slavery –
3 Bac 547. 3 SR 356. 2 H BL 511

Upon y same principle yt Minors are emancipated – see
y last part of Parent and Child – I doubt, an ys wd be consid^ered
Law – It was a rule of y C Law, yt a Female Villein
or male wasn't emancipated by marrying another –
"See Supra"
A wife however is not emancipated by marrying a villein –
But perhaps no consent of y Lord is supposed –
Litt S 1. 87. 2 BL 93.4.
On y other hand a wife is emancipated during coverture, if
she marries a Free man – and former if she marries her Lord –
Co. Litt 123. a. n. 136. B. 137. Ed Vs/L. 314
Can an illegitimate child be a slave by Birth? By y Civil
Law, he may, for bastus sequitur ventrem. In y Eng Law
of villenage, y condition of y child follows yt of y Father –
2. BL 93.4
Litt S. 187.8.
In Law an illegitimate child has no Father. So yt under
y Feudal Law an illegitimate cd not be a villein by birth –
But a legitimate child born of a Slave or villein, is a
villein –
In Conn. according to universal usage, y rule of y Civil Law has
prevailed and through y U States.

The owner of y Mother is y owner of y child in our
Country – Slavery now is almost abolished in Connt –

8.

Importation of Slaves is prohibited: so cont. c 25-6, & all children born of slaves after March 1. 1784. & before y 1. Aug. 1795. are free at y age of 25 — Those born after Aug 1. 1797. are free at 21.

Importation is now forbid by the U. St, as it previously was by y Laws of all y Several States —

It has been agreed generally, yt offenders may be judicially condemned to Slavery for Crimes — as confinement to labour in N Gate and other penitentiary houses, — This is a qualified Civil Slavery — a Slavery to y Public —

III. Apprentices —

These are so called from apprendre (to learn) being gen bound for a term of yrs, to serve their master, & they may receive instruction — 1. Bl 426.

Usually bound to y Professors of some mechanical art, but sometime to husbandmen and others — as Surgeon. Lawyer. Counselor. They must be bound by deed* — A Parol contract of apprenticeship is not binding — Salk 68. 6 Mod 182. Ld Ray 117. 1. Day. 183. 2. Burr. 54. 492. 3 Keb 304.

* Were by y C Law or only by St 5 of Eliz. C. 4. S. 208. By y Com Law. it might have been by Parol —

Nor can a defective contract of apprenticeship be continued into a hiring of another kind — as from yr to yr — 8. T R. 377. 9. (Gaylord vs Riggs. Sup Ct of Conn. Aug. 1808.) We have no such St as yt of Eliz, but our Cts have adopted y same rule — and y contract must be by deed —

It has also been said, yt y relation of Master and apprentice cant be created, ni y latter is expressly retained in y deed by y name of apprentice

3 Bac 4 S.S. 4 Burr, 57.

But yo is denied to be Law. 8. T R 379. 1. East 333. 4 but

It is ye safer way to insert ye word "Apprentice"
Other Servants may be retained by Parol —
3 Bac 546.

10. In Eng. ye children of poor persons (paupers I suppose) may be apprenticed out by ye Overseers, with ye consent of Two Justices, till full age, This is by virtue of Several Stats (1. Bl. 424) and those to whom they are offered are compelled to take ym —
1. Bl 426.

In Connt also, it is provided, yt ye children of Paupers, living idly, mispending their time &c, poor children living idly & ready to want, & any children grown stubborn, rude, and unruly may be bound out as Apprentice —
by ye Select men, with ye advice of ye next assistant or Justice.
Males 21. Females till 18.

All servants, wi apprentices, are entitled to wages, for their service. The wages of Menials (and in Connt of all other also) are settled by contract — Those of Servants in husbandry by ye Sheriff of Sessions in Eng — Bl 428.

Apprentices are regularly entitled to no Wages, 1E. ye Law implies no contract for ye payment of ym — They may have wages by express contract — 8 J Ro. 373. 9. I suppose, quia wages ant customary and apprentices are gen supported with food &c. but not with Wearing.

By ye St 5. of Eliz, tis enacted yt Minors may bind themselves by Indenture, of apprenticeship. But as ye privilege of Infancy, is not expressly taken away by ye St, 1E. not expressly enacted, yt ye Infant shall be liable on ye Covenants, it has been uniformly holden, yt an Infant ant liable on ye Covenants, and yt ye only effect of ye St is, yt while ye relation actually continues, under ye contract, ye Parties respectively enjoy ye right, and incur ye duties resulting from yt relation; & yt ye

if ye Minor serve ye full time, he shall be free of his trade - free to use his trade, but yet in England -
5 TR. 716. 8. mod 19. Doug. 501. Or 518. 1. Bl 426. Cro Eliz 179. 448
We have no such Feat in Connt.

But if ye father or Guardian join in ye Indenture, he is bound by his contract and yet is ye common mode. by ye C. L. Guardian how far bound.

He is liable for nonperformance of what is to be performed, by ye apprentice - Doug. 500. Or 518. Broach vs Cannington - 8. mod 190.
See 2. Mass. R. 228. yt where ye Indenture is in Common form, ye Guardian ant bound by ye Covenants. yt ye apprentice shall faithfully serve, and not absent himself.

In Parish Indentures, (Or town Indentures here) ye Parish officers don't covent, as they act for ye Public, they ant required to subject themselves to any Personal liability -
1. Burr 85. 90. Doug 501. 518. on.

Misuser is a good cause for apprentice leaving his Master - Misuser is any abuse - 1 alk 513. 1. Bl. 428.

13. An apprentice cant be discharged otherwise than by deed * - it is said - 3. Bac. 546 - Ld Ray. 117. Salk 67. 3. Mod 182 - The obligation must be dissolved. "Eo legamine quo ligatur" The amount of ye rule appears to be merely yt he ant discharged by an agreement not executed. nor it be by deed - not of course by a verbal license retracted - But he may be discharged by Misuser -

But yt ye relation may be dissolved by mutual consent - see 8. T.R. 102. 10.
This must suppose an actual abandonment of ye relation, in pursuance of ye contract. For as an agreement not executed, it don't discharge ye Indenture. (Supra)

R. S. L. Cancelling or delivering up y Indentures, must however discharge y apprentice. For y deed no longer exists - (582. Str)

And our Sup Ct has holden, yt y Master having (by ye) y apprentice y said contract, might not maintain an action vs y apprentice's father. The Master caused and authorised y departure and was guilty of a wrong in making y agreement with y Apprentice. To many vs Indentures - Manderville

Eng. 55. 1. Day 153. 3. Do 126. Burr Settlt Cs 542.
1. J. K. 638. 1. East 619. 38. 2. Ter Rs. 374.

14. Cancelling or delivering up y Indentures, will also discharge y apprentice - For y deed no longer exists as a deed -
Str 582. 2. Bl C 308. Burr Setlt Cs. 511. 274.

* Bankruptcy of y Master has been said to discharge y Apprentice; but ye of itself doth not discharge, tho' y Servitude, will, it is said, discharge in such a Case - Post 18.

Bankruptcy by y Eng-laws, (not Insolvency here) -
Str 582. 1. Atk. 148. 3 Bac 550. Mas. & Servant,

"Mr Ros" The may be discharged in Court by County Ct for "Default" y Master (Ct Court 234) and y apprentice may be punished by "County Ct." if guilty of Misconduct - Eden -

The same thing is done in Eng by y Quarter Sessions, and in some cases, by two Justices or by one by appeals to y Sessions "for default of Master or apprentice". But y Stone in Eng only in cases, in wch y binding was by y authority of y Justices - 1. Ho. 426. 3. Bac 550.

If an apprentice marry without y Master's consent, y Master may not for yt cause, turn him away, he must take his remedy on y Covenant - 2. Vern 332. 3. Bac 551.

ye Master cannot at C Law assign his apprentice, y contract being fiduciary. His rights are founded on a Personal Trust, not transferable — Secus by y Custom of London — This assignment is like y assignment of a Chose in action 1. Keb 250. 12. Mod 553. Colert 134.
3 Keb 519. Salk 68.

If on submission to arbitrament, there shd be an award, yt ye apprentice shall be assigned, tis void, nis it is good by Custom or consent of y apprentice (126. Str) Secus by y custom of London — This assignment is like y assignment of a Chose in action —

But tho' at C Law, y assignment of an apprentice, don't pass y Master's right or interest in him; it is good as a Covenant or agreement to bind y assignor — So tho' y words are only "Grant and assign" & wh are words of Grant merely, & no express covenant. Yet if y apprentice serves under y assignment, he may gain settlement by it in Eng. But he ant compellable to serve, nor can y assignee maintain any action on y original Indenture — Ld Raym. 683 — Salk 68. Doug 68 — 1. Bos & Pul 96. even if y apprentice agree to serve him and then leave him Mus 96. 96.
If he don't serve Pursuant to y assignment, y Master is liable on Contract broken to assignee — Ibid —

16 —

As y Master cant assign his right in y apprentice, so he is bound to keep him under his own care — He may not send him abroad even for improvement, nis by agreement and y nature of y agreement or business requires it — 8 Mod 236. 12 Do 446.
Keb 134. 5.

The Executor of y Master cant hold y apprentice, The master's right ant transmissible — The contract to serve and to teach, being fiduciary — 2. Bos 35. Salk 68. Str 126.
Ld Ray. 683.

Overruled But it has been holden, yt y Executor is liable on y Covenant, when y Covenant to teach is absolute) & is bound to procure him instruction* This has been done and I think justly. 1. Sn 177. J.C. 1. Sid 215. Contra 2 Sid 126. Salk 666 – Mats Part, 295.

An Master's executor is bound by y contract, to furnish board, cloathes &c. to y apprentice during y Term, has been a question – Tho' y current of authority, he is liable when y covenant is absolute to board, cloathes, &c during y Term – 3 Salk 41. 1. Ld Raym 761. 820. 1. Siles 215. Pro Elve 553. 1 Bog. 30.

Suppose y Executor not named in y Covenant, I conceive, yo wile make no difference, he is bound if at all, with naming

17. *The question depends upon y structure and Terms of y Master covenant

These authorities, it has been said by some, are hardly agreable to principle? For as y necessaries are to be furnished generally in consideration of Service, and as y Executor has no right to y Service, he ought not perhaps in Justice, be liable for y necessaries – But if y Master covenants unconditionally, to furnish him for a fixed period, how can such liability be evaded with impairing y Contract – It is like a contract to pay rent for a Term, and y building leased is burnt during y term, in yo case, he must pay y rent unconditionally – unquestionably –

If a Premium is given, y Exec as all agree, ought to provide maintenance or restore a reasonable part (or a proportional part) of y Premium –

In Eng, Eq hs in some cases, has ordered a part to be restored, as if master die soon after apprentice hath commenced – & has even decreed a large proportion to be restored, where

where a smaller one had been agreed upon between y parties, This is going very a,!!! The Master's death had been anticipated & provided for — 1. Vern. 400. 1. Mo 148.

So a master in turning away an apprentice, has been 13.
decreed in Chy to refund a part — 2. Vern 64. The father is a creditor for a part of y amount of y Premium —.
2. Vern 64. . Atks 148. 3 Bac. 550.
So on a masters becoming a bankrupt and abandoning his profession —

And when Justices in Eng discharge an Apprentice, they may order y master to refund a part of y Premium —
The not expressly authorised by y Law or any St —
3 Burr 550 — 1. BL 426. Salk 67. 11. Mod 110.
1. Saund 314. 3 Bac 550. (430)

Whatever an apprentice earns by his labour, during y apprenticeship, belongs to y Master, for all his Services are y Master's — 12. Mod 415. 6. Do. 69. Str 582. Co Litt 117. n. 5. 6.
An apprenticeship "de facto" will support y claim —
Salk 68 — 6. Mod. 69 — As when y contract of apprenticeship, is void or not by deed —, but both parties treat it as valid.

13. Property of any kind, thus earned by y apprentice, may be 13.
recovered by y master as his own in any proper action, Ibid —
As if y Apprentice work at different times for a wach —
it vests in y Master — And so, tho' y labour is done without y Master's consent, and not in y time of y Master's occupation. { Ibid }. time 1. Ves. 83. Str 582.
Salk 68. Co Litt 117. a. 12. Mod. 415. 6. Do. 69.
The last rule, (Semble) don't hold in y case of other Servants — ✠
in Slaves — In y case of other Servants, y Master can't recover y Servants wages, The proper remedy is by an action on y case — for loss of y Service, if y Employer knew of y former Relation — or an action by y Servant himself for a breach of contract — Co Litt 117. a. Cro J. 65.
D
✠ 18 apprentices and Slaves — 2. Lev. 53. 3. Bac. 56. 559.

20. If an apprentice, or any other Servant is enticed from y master's service, "an action lies vs y Enticer — 3 Bac 51. Cowp 55. Post 63. an action on y case with a per Quod," And a Journeyman is a Servant within y rule — 1 Modes. 409. n.

For taking away of a Servant with force, a Trespass lies. For enticing him away, "Case" on principles, is y only remedy — 1. Lilly Entic. 72. Stoy 105. 2d Kay 1117 Salk 380 — 3. Burr 56. 2 T R. 157. Ld Raym 1032 — Post 63 —
In Lilly's Entics 72. y form of action is "Case" —

But in Cowp 55. & 6 — y wrong was "enticing" but y action (and it was supposed) is called Trespass by y Reporter — But See 1. Salk. Entic 72. where y precedent is in Case. Bar. Fem. 65. Per. Chila 115. 116 —
P G. imputes yo mistake to y Reporter —

In Eng. apprentices gain settlemt in y Parish, in wh they were y last 40 days — by St.

In Connt, being under age, they gain none — For an apprentice don't maintain himself (as our St requires to gain a residence by Settlemt) For he ain't emancipated —

By our St. apprentices and other minor Servants absconding without sufficient cause, are liable at Full age, for all y damage thus occasioned — This considers y contract binding —

3d Menial Servants

These are Servants employed Intra Mænia, Domestic —

1 Bl 425 Kelyng 18. If y term of Service ain't fixed by contract, y hiring is in Eng considered to be for a year, upon y equitable principle, yt one shall serve and y other maintain thro y Seasons — 3. Bac 546.

No Such Rule in Connt —

In Eng. by y St 5. Eliz, a Servant in certain cases can't leave his Master nor can Masters dismiss their Servants, either before or at y ends of y Term, wtht a Quarters, notice, nt allowed by a Justice

No Such St in Connt.
But y Servant may be turned away for incontinency or any Moral Turpitude 1. Bl 425. Ch n.

IV. Daylabourers. Daylabourers

There are no General Rules applicable exclusively to these except in Eng by St 5. Eliz ant 6. Geo 1st 1. Bl 426.7.

They may be retained for any Period. We have no Similar St.
These Sts provide, yt all Persons, having no visible effects, may be compelled to labour. The Justices at y Sessions are to settle their wages. Penalties are inflicted upon those who give or exact more yn a certain sum.
In Connt We have no Stat of yo kind.

V. Agents

As Factors. Brokers. Stewards, Bailifs. Ship masters, Mgrs &c, These are servants in relation to such acts only as affect y property of their Employers. 1. Bl 427.
Amb. 252. 2 97. 8. 1 Modes. 464.
As to y classes of Persons falling under yo denomination see ante 1.
The Principal has not y same general control over these, as a Master has over a Common Servant.
They are subject to his domestic government like other Servants. Tho' they are bound by Law to act for yn according to their Contracts.

23. As to y rights and duties of yo kind of Servants, & their employers, tis difficult lay down Gen Rules -

A factor is a commercial agent in a foreign country, A broker one residing in y same country with y Owner -

Every factor, broker &c ought strictly to pursue his commission (or Instructions) for his own security - as he ant then regularly liable for casual losses, Secus he is -
1 Wodes 469. Com D. Title. Mercht. B & D.

A Factor may retain y goods of his Principal in his hands, to satisfy a General Balance of accounts in his favour - (*Aliter as to goods specially deposited with him for a particular purpose -) This Lien, ant confined to goods, wh he may then hold, but extends to any he may hold - But by giving up possession to y Principal, y Lien is lost - for y Lien being founded on possession is thus abandoned - * Ante 254 - 2 Bl Rep. 1154 - Esp D. 108. 584. 1 Burr 493 - 1 East 335. 1 East 335. 1 Bl Rep 1 East 4. 2 Dr 227. 523) 104.

1 East 335.

* Because he is Factor only to goods wh he is to merchandize. Esp 108. 206.

Marsh. Ins. 121. He has y same lien upon a policy of Insurance effected by him on y goods of his Principal - 1 Burr 494.

He has y same Lien "on y price of y goods" in y hands of any Person to whom he has sold ym - and may compel bendee to pay him - Cowp. 25. 250

But y Factor has no Lien on y Principal's goods, till they come to his actual possession - Constructive possession, IE. a right to demand possession, ant sales -
2 Com Dig. Ante 34. 3 i & 115.

They don't become a Pledge 'till actual delivery, possession being essential to a Lien - (Bailmt 87)

The rules relating to a Factor's Lien, are part of y Law Merchant or are derived from yt Law— Com. D. Mercht— Lien D. 1. 1.

A Carpenter has no lien upon a house, wh he may have built— Pc.

If y Factor goes more or pays less yn his commission warrants, the principal in y disclaim y Purchase— If he sells at less price, he himself must bear y loss— 1. Ass 510— Com. D. Mercht. B. 2 Mod 13— If he purchase more he himself must retain y surplus & there is no ground of disclaimer—

So tho y goods are perishable— 2. Mod 168— Contra 1. Brown C. 23— 3 Bos Puc 439. Ins 405.

So if, he sells on credits, wi authority to do so— by his commission— 1 Ves 510. 2 Mod 100.

Quere an y sale wn't still lawful wn confirmed by merchants at y place of consignation. Com. C 235. 6 John 601 1. Cowp Cowp or Camb 258. By commission, del credere, 1. Com. 444. he may sell on credit, but but must guarantee y 3 Bos. 485. Sale— ~~3 Bos 480 "Factor when sells 400.~~ 1. J C. 110.

A Factor has no right to pawn y goods of his Principal, as his own, for his own debts, and if he does, y Principal may have Trover vs Pawnee (on tendering to y factor y ballance due to him, wthout any tender to y Pawnee) The factor's lien being a personal right wh cant be transfered— Str 11. 3. 3 T R 004. 000. 7. East 5. 1. Bos. 048. 2. Com. 362. Com. Dig. Fac. B.

And it seems, now settled, yt no tender at all is necessary— 7. East 5. For y pawning is tortious— Tis a breach of Trust.

Quere, might he not pawn yn for his Principal? I see no reason, why he may not—

But if y Factor delivers ym over as his Principal's tho' to secure a debt of his own (within y amt of his Lien) with notice of his Lien: y creditor, (tho' Factors Pawnee) may avail himself of y Lien, it seems, (1. East 5) for in yr case y pawning ant tortious - and y possession is for y Factor. There is strictly no transfer of y Lien attempted. There is no risk or danger incurred on y part of y Principal. For y factor is answerable for y acts of his Servant -

But he may sell y Principal's goods, or merchandizing
1. Str. 112. 2. Esp. R. 493. moneys in buying and selling & may in his own name, sue y vendee for y price - Bailmt 111. 1. T. R. 30. 9.
Bull N. P. 130. Str. 10. 1. Str. 52. 302. Cowp 29. 5.
For he has an beneficial interest in y commission and sues in his own name -

Park Ins. 403. 2. Str. 1270. 5. Salk 446. 5. So brokers and Policy brokers may sue in their own names -
So Shipcaptain for freight - for y same reason.

N. B. In all these cases, the principal might sue -
2. Str. 1270. 331. 2. in D. 5. 1. Str. 81 - 1. Str. 359 - 360. n - a. I take y reason why y factor may sue in his own name, is, yt he sells in his own name - Ist P. G. So an auctioner who is strictly a broker, may sue for goods sold by him, as auctioner in his own name, and even tho' they were known to belong to another - He, like a Factor, contracts in his own name - and has a Commission -
Bailmt 111.

But if y Factor's principal, not being indebted to y factor) gives notice to y purchaser, to pay to himself - & not to y factor, y factor. y purchaser ant justified in paying to y Factor - So 1182. Esp D. 1st. 204.
F. v. Y. - v. y. 1 W & v. 95. v - v. 1 F. 9 y

*Aliter, if there is a balance due to y factor from y principal. The Factor, in ys case, has a lien on y price, in y hand or y goods in y hands of y vendee (ante) a right snot to y or y Principal –
1. Cam. 444. Cowp 254. 255. 2. East 227. 3 Bos Pole 485

In each of y preceding cases, however y action may be y 20, y principle Principal – 7 T R 359. 60. n. a.
" H Blc. 81. 1. Chitty Plead. 5.

If y principal & factor both give notice to y vendee to pay to him, for his own safety, y vendee may bring both of ym before Equity – and litigate y point.

An Auctioner is not liable for selling goods to y highest bidder, tho' for a less sum, yn y owner directed – For y act of setting up goods for Sale at auction, amts to a contract with y bidders, yt y highest bidder shall have ym –
But he is bound by instructions, to set up goods in y first instance at a particular price – – . nor nor ye of 1. y 2. 1 ye 1 yr. – 2 ns. – 1 c. yr. Cow. 395.

An Attorney, also, has a lien" on y papers and Judgmt of his client for his fees, and may direct y adverse party to pay y costs to him & not to his client – But ys right is subject to y equitable claims of y adverse party upon y client.* As a claim to set off"
8. TR 8. 70. 571. 1. East 464. BLR. 826 4 TR 123. 6 Do 361. 450. Doug 113. 238)
1. H Blc. 24. 122. 207. 657. 2. Do 440 587.
For y Atty can't have a higher right vs Judgmt debtor, yn his client had –

*The rule don't hold of Counsel fees, nor as to Counselors, only to Costs of Attorney –

An Attorney who executes an instrumt for his Principal, shd do it in y name of y Principal. As A v. by Ed his Atty –

Seem he binds himself -

9. Co. 75. 1. But no particular form is essential 2. East 142.
Hob. 53. Str. 705. 1. Ld. Ray. 418. 5 T R 17. 1. Co. 18. Str. 955.

27. An Agent can't bind his Principal by deed, without an authority for yt purpose by deed - Semble -
2. P. & S. 1. T R 26. 203. 4. Co. 31a. Com. D. atty, E. 1. 5.
For as no one can be estopped by any act of his own less solemn yn deed, he can't by any means, less solemn, subject himself to an Estoppel by y act of another -

Public Agents. An agent for y Public, contracting as such, ant personally liable for his contracts - Post 42. 45 - Mr Dexter Case - Secretary. Sub. Cl of Ld. 1. TR 172. 6/4. 1. East 582.
1. Post 89.

29. The remedy of y other party, is an application to y Governmt. The principle is y same as in Private Agencies - When he makes a written contract, it shd appear on it, yt he is acting as Public Agent -

Altho' no action can be brot vs Governmt, Pts Justice is satisfied - Where can action be brot vs governmt? Ed. S. answer none cans

Rules applying to Masters and Servants Generally - When y Master is bound and can take advantage of y acts of y Servant -
General Principle Those acts of y servant, wh are done by y Masters commands express or implied, are in legal contemplation y acts of y Master, & regularly all acts done by y ~~Master~~ Servant, in y performance of business, in wh he is employed by y Master, are deemed to be done by y master's command - "Qui facit per alium, facit per se -" 1. Pt 490. 2. T R 442.

30. Whatever y Servant, ergo does by y express commands

y Master. Whatever y Master permits him to do in y course of his business, whether he does within y scope of y Gen authority given him by y Master, are y acts of y Master. For these acts are all done in y performance of business, in wh y Servant is employed by y Master.

30

A contract made by y Servant as Servant, he being authorized to make it, by his master, is made in legal contemplation by y Master himself. As a Promise by an Ex a Master on Servants account 3 Bac 509. 2. New R 41

If a Servant is cheated of his master property or goods, y Master may recover it back, by action as y wrongdoer. 1 Role 98 Cro J. 223. 3 Bac 509.

If a Servant is robbed of y Master's goods, in y absence of y Master, either Master or Servant may have action as y hundred - in Eng - "Bailment 111" 2. Salk 613. 3 Mod 283. 4 Bo. 502. 11. Bo. 8. 12. Bo 54

31.

The Master may sue because y goods are his - The servant may sue by reason of his own liability to y Master. Quere as to y reason, or he will liable, "prima facie, in case of robbery - Post 50 -

The real reason is, y goods are considered as y Servants as all persons in y Master - Bailment 106. 10. 12. 3 Ex an action he sues as tho' y goods were his own - 2. Saund. 3/P. 3. Mod 283 - Sal. 613 Policy may require it - as the Master at a distance - And a recovery by either bars y other's action - and y commencement of an action by one, bars y other from prosecuting - Lach 127.

Where y Servant sues he declares on a possession as of his own as of her own goods, for they are his as ale. in y Master - 3 Mod 289. Salk 613.

But if y servant is robbed in presence of y master, of y master's goods, y master only can sue.

32. For in such case, y taking is deemed to be from y person of y Master 1. Hawk 148 Public Wrongs 63. n — besides there is no necessity for allowing y Servant to prosecute — on y ground of Expediency.

Earth 145. Lee 3.

If y master's money is gained from y servant by illegal contract, y master may recover it back — Even if y Servant squanders it there being no fraud in y other party, and no illegal contract — As if he embezzles it by paying it for his own use, to a Bona Fide Receiver. 3 Bac. 559.

3 Bac. 559.

Here y party receiving it, being guilty of no fraud, or crime, y Servant only is in fault — [illegible]

If an Innkeeper's Servant robbs y Guests, y master is bound to make restitution — See Inns and Hosters — 1. Ro. 430. 1. Roll 2. 8. Co 32. Dyer 266.

33. So if y Servant of an Inn sells bad wine, so as to injure y health of y Guests, y Master is liable to an action —

But y Servant in ye case ant liable, tho' he knew y wine to be hurtful, he acts as Servant merely — Sed Quere. for y act is unlawful and wilful in y Servant, and tis a general rule, yt where a person has no right to do a given act, whoever does it at his command is a wrongdoer, as wele as y person commanding —

If y Servant does an unlawful act at y command of y Master both are liable —
For y Servant is bound only such commands as are honest and lawful — 1. Rol 430 — 1 Wms 328.
Wms & Sho. 58.
[illegible]

But if a servant in obedience to his master's commands becomes instrumental in a wrong, of wh he himself is ignorant, he ant liable, for he is but an involuntary instrument. As if Master locks one in a room and gives ye key to ye servant, ye latter being ignorant of ye fact wont liable. 3 Bac. 563.

But ye rule can only apply to such acts, as are in themselves harmless, as in case just subjoined. It cannot hold in general, if ye act is in itself unlawful or it constitute a forcible injury. For in ye latter case, ye law dont regard ye intent, when a Civil remedy is sought. 2. Bl. 832. "Ut ultra"

action of Trespass for battery, and in ye former ye person committing ye act, is liable to civil for all its consequences. As a Servant fells a tree by Master's commands, he is still liable for ye damage. he has a remedy vs ye Master.

The act of ye Servant done witht ye Masters command express or implied ant regularly considered as ye acts of ye Master. As where ye Servant acts witht ye Masters direction and not in discharge of any authority or business, with wh he was generally or specially intrusted by ye Master. The Master ant liable for injuries thus committed vs third persons. or upon contracts made.
A Servant leaves his work in ye field and commits a battery, ~~and~~ makes a contract for ye Master wh he had no authority to make. 3 Salk. 282. 6. Mod. 393. 1. Bl 431.
So to ye effect of a subsequent assent by ye Master. Post 46.

Upon ye principle it has lately been decided, yt if a Servant while performing his Master business, commits a wilful Injury to another, ye Master ant liable. ✕
As driving Masters carriage wilfully vs another. East 106.

for ye act in furtherance or servance of ye Master, but in fact. ergo no command implied. East 106. 1. Bet & P. 472. 3 T.R. 762. 2. Do. 136. 1. Bac. 562. Salk 441. Cowp 1. Woods. 465. This ye same thing as if ye Servant had wantonly broken another's carriage, by throwing a stone or it. by aid of a club.

But ye rules ain't universal. Tho' I think ye principle clear, upon ye principle post, where ye Servant left ye field.

35. But if a Servant in performance of his Master's business, commits thro' negligence or want of skill, an act injurious to a Third person. ye Master is liable. He must at his peril employ careful and skilful Servants. But he ain't an Insurer vs their unlawful passions, or those of those of their acts foreign to his business. In ye first case, ye act is his, in ye others tis not. If a Servant drives negligently vs another's carriage, Master is liable, tho' he didnt in fact command it. * Seems if he wilfully drives thro' or commits any other wanton wrong. 1. BC. 431. Trespass on ye Case 5^s. 6. T.R. 125. 6. 5 Do 648. 2. H BC 542. 1. East 106.

* Servant is also liable in this case in Trespass. Post 52.

37. A carters servant drove negligently vs another's cart, and bilged a pipe of Wine and ye master was held liable, so where he drove by neglect over a boy. Salk 551. La Ray. 739. 1. Woodes. 565.

2 Roll 553. So if a surgeons apprentice injure a wound thro' negligence
3 Bac 560 or want of skill, ye master is liable. ** Post 40.52.3. 1. BC 430.

** [illegible]

The distinction as to masters liability between negligence and wilful wrongs committed by Servants, has been but lately settled or fully understood and ye history of the

modern decisions on ye subject, is as follows—

I. 1794. 2. T R 125. Case was brot vs ye Master, for ye servant's wilful driving his carriage vs Pltff. Held, ye case would not lie, because Trespass is ye proper action — but no doubt was expressed ye Master liable —

II. 1795. 2. H B 442. Trespass vs Master for servant's negligently driving his carriage vs Pltfs. Held ye case was ye proper action — see 1 Ro. 446. "Trespass or ye case. 5. b.

III 1800. 1. East 116. Trespass vs Master for servant wilfully driving his carriage vs Pltfs carriage — holden. yt no action wd lie vs Master — 1. Bel P. 475.

These are ye established rules —
These decisions however are all correct — In ye first and Third cases, no action wd lie vs ye Master — for ye Pltff did not in fact recover — The reason assigned in ye first, yt trespass was ye proper action, was wrong —

In ye second, both ye decision and ye reason assigned for it, are correct — For without doubt, when ye Master is liable, for even a forcible injury committed by ye Servant with ye Master's actual direction, "Case" is ye proper action — For ye Master is liable on ye ground of negligence — Tho' ye proper action vs ye Servant in ye case, is Trespass —
See Trespass on ye Case 5.

07 Sheriff, however is liable in Trespass for ye forcible wrongs of his Deputy — Post 41 — For he and his deputy, in Law constitute but one officer and ye return of Service is always in his name, as every official act by either of them is —

1 Bos Pul 404. 6 T R. 604. If a servant employed in his master's business employs another servant, who by his negligence in performing it, injures a stranger, y Master is liable as is also y last servant in many cases.

Post. To render y master liable, it must appear correct — So if y injury were done by one employed by y last Servant — y Master is liable —

40. But in y last case, y action lies only as y immediate Agent, as y Master. The intermediate Servant is not liable, for he doth commit an Injury — nor is he y Master of him who does — 6 T R 411 —

In general, (as already stated ante 35) y Master ant liable for y wilful Torts of his Servant — Post 53.4. ante — But it is otherwise, I conceive, when y wilful wrong amounts to a violation of y contract between y Master & y party injured — As a Servant to a P Smith wilfully lames a horse in showing him — A Sailor's Servant wilfully spoils a garment in y making &c. For in these cases, there is an implied promise, by y Master, yt all necessary skill, care and fidelity shall be used in performing y work — 1. Ken Bl. 3 Bl. 158. Do 165. 6. Id Ray 910 Jones on bailmt 73.4. 3 Bl 165. 6.

I dont however consider ys an exception to y Rule, that a Master ant liable for y wilful Torts of y Servant — for in these cases, y Master ant liable for y Torts as such, but only a breach of y implied contract —

The master in such a case is liable on his contract, but he cannot, I conceive, even in cases of ys kind — be charged in Trespass, ante 35. If so, he ant liable for Servants wilful Torts, considered as Torts, but for a breach of his own contract, Suppose abandoning y Contract, owner brings Trespass in common form —

, he cant recover, I trust, so if he bring Case "ex delicto" not alleging y Contract—

A Sheriff is liable civiliter for y Torts and defaults of his undersheriff, in y execution of their office— as neglecting to execute Legal process, So by arresting a by mistake under a warrant vs B—

In y last case Trespass lies vs Sheriff, for he and all his officers make but one officer in Law—

And for more neglect of duty, y Sheriff is only liable at C Law— The undersheriff ant liable 1E. to y party aggrieved— For in such cases, y action is bro for a breach of official duty only I y m unde Sheriff, not being a known public officer, ant liable in his official character, and dont act in his own name—

For positive Torts, y unde Sheriff is liable— as embezzling 42— an execution— for voluntary Escape— for arresting a wrong person— &c

In these cases, he's sued not as an officer, but as wrongdoer—

The Sheriff is also liable for even y wilful Torts of his Deputy—, if they include breach of official duty— as embezzling an execution for a voluntary Escape—

In Comnt, in all y above cases, both are liable, for y Deputy here is a known public officer and acts in his own name—

A Postmaster ant liable for y default of his Subordinate officers— He is himself a public officer— ante 2v. Salk 17. Cro J. 624 Trespass on y Case :: Bailmt 6 J. Cb— and as such liable for an injudicious selection of Servants, only to y Public— Cow 754. 764. La Ray 646. Carth 487. Comyns Rc. 100.

43. But a Postmaster is liable for his own actual default & so a deputy Postmaster for his –
3 Wils 443. Cow 765. 2 Bl R 906. Esp Dig. 523.
In such cases, he is liable as any other individual wd be for his own Tort – see Bailmt – and Indebitatus Assumpsit will lie vs him for money illegally received to his own use. Post 45. Cowp 180.2 –

Contracts
8 MR 334. 3 Esp 75. 2. Vern 543. 643. Comber 458

The master is bound for contracts made by him, or by servant, whenever y latter in making y contract, acts within y scope of an authority delegated to him by y master – Ante 29. 30 – Ld Ray 224. 3 T Rep 234. The authority may be Gen or Special, Express or implied – 1 Bl 457. 10. Mod 398.

A general authority in contract, is one wh ant confined, to any individual contract, but extends to all contracts generally – or to all of a certain kind – as A employed a servant to purchase necessaries generally (on contract –) for his family,

A Special authority is confined to one or more individual specific transactions – as. A employs B to buy a horse for him on credit –

A general authority may be implied from y master's usual or frequent practice – 1. Bl. 430 – as if he usually permit y Servant to purchase necessaries on credit –

A Special authority may also be implied as if Master stands by and hears y Servant contract for him – 1. Rw. 131. 2. 1. Bl 430. 1. Rw. R. 131. 2.

45. If y master has made it a practice to send his Servant for necessaries, for money, & has permitted y Servant to trade for him in no other way, he ant liable for

what y Servant may very upon Trust. There is then no implied order to y Seller to trust y Servant, and no implied authority to y servant to purchase on Trust.
Contracts 16 or 14. 3 Salk 234. 1. Show. 95.
116.

Seems if y Master has usually and frequently permitted him (y Servant) to trade on Trust. Here he has given y Servant credit with y Seller, or so y call might be with y Public. 1. Bl. 430.

And if y Master has once paid to what y Servant has bot for him on credit, w'ht expressing his disapprobation he will be answerable for y subsequt purchases made by y same Servant, from y The same Tradesman, or vendor till he gives y Tradesman an express, order to y contrary. For y payment will be equivalent to a direction to trust y Servant in future. 1 Bl 430. Ch n

And if a servant without any prior authority, general or special, 46. buys for his master goods, wh come to y Master's use, he is liable, for he is bound by his apparent subsequt. ante 35.
Comb 480. 3 Keb 625. ~~1 Bl 430 Cam~~ 3 Salk 234. Ch. Bx. 26.
Suppose in y last case, y master had sent y Servant with money and yt y Seller had kept it, & bot on Trust. There being no prior authority in y Servant to trade on Trust, & y master being ignorant yt y Purchase was made on credit, wd y Master be liable, quia y goods had come to his use? Doubtful. Ld Ray. 224. 3 Salk. 234. 1. Com. C. 221.
Peu R 48. 5. Esp R. 214. 3 T R. 760. 10. Mod 116. 3 Keb 625.
There is no apparent implied subsequt, in yr case, & if so, y master, I conclude, cannot be be liable, for there is no pecuniary authority. In yr case y vendor must y Servant at his peril.

But if y credit is obtained by y Master's authority, and y Servant embezzle y money given him to pay y debt, y master must bear y loss. 5 Esp 75. 1. Com. Con 221. Ray. 224.

For in yd case, y master is indebted on a contract, made by his authority and y vendor is no party to y act of embezzlement. The master, therefore takes y risk of y embezzlement.

But tho' y master has permitted his Servant to trade for him, on Trust, he may discharge himself in future, by forbidding y Tradesman to trust y Servant again, on his account, but not by orders known to himself

4/. Servant only: Nor (for a time) by a private dissolution of y relation: and all cases of yd kind, y prohibition or dissolution shd be as public, as y credit before given by y Master to y Servant — 3 TR 760. 61. 10 Mod. 109. 12. Bo 346.
Chitty Bills 27. 6. Pea R 42. 154.

And if a Servant in selling property, wh he is authorised to sell by y Master, make a warranty, y Master is bound by it, ni y authority was expressly restrained —
Esp R. 111 Esp. D. 630. 10 Mod 109. 4 TR 177. 3. Bo. 757. Cro 505. 653. Salk. 289.
And even when y Servant acts within y scope of General authority, even an express restriction not made public, and not known to y Purchaser, will not exonerate y Master de. Sale by a Servant at a Livery Stable of a horse, with warranty, when a general authority and credit are given to y Servant. Secus if y Servant were only especial agent: There shd be no general credit given him with y Public, and therefore to rely on y warranty shd be y folly of y Purchaser —
3 TR. 760. 761. 10. Mod 109.

3 TR 760. 62. The above distinction between a General authority's effect and a Special one, applies in general to contracts made by Servants —

Idem Quere as to y case of Southern vs Howe Cro J. 469 or 6. Popham 3. Burr 550 — 3 Bac. 560 — 2 Rolls R 143. (3 Bac 5. 7. 26. or 20. Esp D 629. 32. 2. Rolls 5.
For y Servant wasn't expressly restrained from

warranty! he wilfully concealed y defects, wh is in Law, is a breach of Warranty. 2. Rolle 5. 2. Esp D. 629. 32.

Quere. as to y fraudulent sale of an unsound horse, by y Servant at a fair, y master not having directed him to sell to any particular individual. In such case it has been held, yt no action lies as y Master.
1 Rolle 95. Popph. 143. 3 Bac. 560. 2. Do. 595.
It seems however agreed, yt if y Master directed y Servant to sell to A and y sale was to A him, y Master wd be liable — See cases cited in y Text — How can ys vary y case, & whether he directs y Servant to cheat A or any one whom he may meet &

According to y general rule, ante 17. If a merchant's clerk sells goods for his Master, and warrants them to be sound, y Master is bound by y Warranty. So in other similar cases.
4 T.R. 177. 3. T.R. 757. 3 Bac. 553. Salk. 282. 9 Ser 653.

The Servant ant regularly liable, on y contract which he makes for y Master. But he may subject himself personally, even in transacting y Master's business, by an express agreement or warranty in his ~~name~~ own name — as if he make a warranty on his own credit —
1. Rolle 95. 3. Bac 563.

And undoubtedly if y Servant make in y Master's name a contract, wh he has no authority to make, and by wh his master ant bound, he must be personally liable — Contracts 12. 2. Bem 127.
Might he not be subjected, as y case may be, in an action of Deceit or in Trover, or any other, action adopted to y case — in Tort?

Cd he be subjected at Law, upon y Contract, in as upon a contract implied? by reason of Warrantee

The wife, child, relation or friend acting w. him under a general or special authority, is his Servant within y. Rules wh. govern y. acts of y. Servant w. y. rest of y. Master.

1. Bl. 430.

Cro. Jac. 2 Bin. Gett. Leers at to Slaves. 2. Cro. R. 733. 3. Bos. & Pull. 247. 476.

The master ant liable for expences incurred by servants & hires

But y. master may be found by Jury control. This rule dont hold in Const., w. to Slaves, for it is law, & not where slavery is regulated –

Nor y. wage clear in Const., in y. case of apprentices &c. On such cases, y. Master, covenants to bear such expences –

Now as the Servant is liable for his acts, & y. master to Strangers & to his Master

General Rule. Those acts of the Servant wh. are not done by y. masters command, express or implied, ant in law y. acts of y. Master – ante 34.5. For these, ergo, the Servant, and not y. Master is liable –

In these cases, he dont act as Servant –

And y. last rule applies regularly, to all cases, in wh. y. acts of y. Servant are not in y. discharge of any business or authority, with wh. y. Master has intrusted him, as in y. case of wilful Torts of y. Servant. ante 34.5.

In some cases strangers injured by y. acts of y. Servant may have their remedy either vs. y. Servant or y. master. The general rule seems to be, yt if y. Servant in y. performance of y. Master's business, does an injury to another, the third negligence, ignorance or want of skill, y. Servant himself as well as y. master is liable for the party injured ante 36. Str. 1083. 1. Mils 328. 6. T.R. 411. 25 arg. Ray. 224. Cro. J. 580. 86.

Action of the transaction, in wh the servant was engaged to the master, was founded on contract between the master and stranger, ante 36.7. The servant negligently drives master's carriage against another and breaks it, or overthrows persons, the servant as well as master is liable: the party injured has a right to consider the servant as the only author of the injury and not bound to enquire into the private relations. —

In this case, action vs the Master, "Case," vs Servant "Trespass"

Seems, I conceive, if the transaction is is founded on contract ante 36.7. In such case the master only is liable to the party injured — he is liable on the condition expressed or implied for the act of the Servant, being here, the act of the Master, in performance of his business. In the execution of his contract to B Smith's servant lames a horse, in shoeing him — this negligence — A Taylor's Servant makes a garment unskillfully. In both cases the contract of bailmt is violated in both cases, in legal contemplation: by the master. Indeed the Master only can violate, in legal "judgmt" his own contracts. ante 4-40- 37.5. Cowp 406. Ld R. 585.
Salk. 603. 1. Bla. 481.

There is an exception however to the last rule, for the Master of a Ship, (as well as the owners) is liable to the Freighters for damage, caused by his negligence, tho' the contract of freight is made between the owners and Freighters; and because the Master, it is said, is considered an officer. But what then? Salk 440. Carth 58. 1. Bents 190. 232. Ray 220. 6. Mod 125.
The rule, I conceive, is founded on convenience and forms only an exception to the General rule — The owners are often unknown — Besides ain't the bill of lading always signed by the Master?

And if any Servant commit a wilful Tort, he is liable, I conceive, in all cases to the party injured, even tho' the

transaction was founded on contract (vl ante) as in y case of Smith's Servant wilfully taking a horse; for y act ant in performance of y thing contracted to be done - it ant in pursuance of y Servants authority, but a distinct wrong. If y Master himself had done it, y owner, I think, might waive y contract and sue him in Trespass - ante 40- 1. East 106.

A public agent contracting or acting as such, ant personally liable - as it is said ante 27.

Upon y principle, Indebitatus asspt. for money had & rec'd not vs an officer of y Revenue, for an overpayment made y mistake, for he acts for y public in y exercise of his of his office. Application must be made to Government Cow. 69.

But an action will lie vs a public officer, for money extorted or illegally received to his own use. Cowp 182. as to that he acts for himself and as a private wrongdoer - ante 43. 36. asst 6.

If an atty knowing and being witness of a release from a to B, brings an action for it vs B, he ant liable to B. He acts as a Servant and ant obliged to Judge over his own client. This is y act of Client. Esp. D. 618. Hutton 125.

But where y Atty for y Plff, after a nonsuit, entered, judgmt as y Def, he was holden liable to y Def - This is a wilful wrong of y Atty.

The Servant is liable to his master, for all wilful wrongs, & all negligence by wh y Master is injured. As A Servant intrusted with y care of Master cattle, suffers them for want of care, to be injured. P-88. 1 Wades 466. 3 Bac 364.

If a merchants Servant lends y Masters goods before y duties are paid and they become forfeited in consequence of y act y Servant is liable — Cro J. 265. 10. Mod 109. 3 Bac. 564.

No action lies vs a Servant for a mere breach of y Masters 57. orders, if no damage is sustained — Correction is salts remedy — So for ill manners.
1. Selwin 298. 3. Bac. 564.

But if y Servant disobeys or neglects to perform any of y lawful commands of y Master, and y latter in consequence of y disobedience and neglect, sustains any damage, an action lies vs y Servant.

To when there is a neglect of duty, tho' no express command an action lies vs y Servant, if y master sustains any damage in consequence thereof. vs Hy negligent Client cause — Trespass on y case — Esp Dig 61. 1 Sel 288. 2 Lev 88. 4 Burn 2000. 2 Mls 325.
The Servant undertakes regularly, only for diligence and fidelity — and not for strength or skill — He is liable therefore, generally for such loss only as is occasioned by want of diligence & fidelity —

Hence he is generally not liable for a loss of y Masters, goods by robbers, for ordinary care and diligence can't guard vs it — ante 31. "Bailmt 47." 13 Mod 109. 4 Co 84.
3. Bac. 564.
And in general y Servant isn't liable for losses, caused by mere accidents, vs wh ordinary diligence & fidelity isn't a safty guard — guard — 13 Mod 109. & 3 Bac 564.

But y Servant is liable even to Master, whenever y Master has been subjected to damages or injuries done to third by y misconduct or culpable negligence of y Servant —
2 Str 1083. 10 Mod 109.

8 T. R. 186. Hardren 164. Hilly 116.

The last rule however supposes, y master not to have been actually a party to y wrong committed by y Servant, If he was, he has no claim on y Servant. for between Ye wrongdoers, there is no contribution and no remedy of any kind. As master commands Servant commit Trespass and is subjected for it.

How Far Servants are punishable for embezzling their Master's goods. See Larceny in Criminal Law.

Masters authority over Servants.

The master has y general right to chastise his servants, for any breach or neglect of duty. As for disobedience, Insolence, negligence &c, 1. Selw 175. 177. 1. Bl. 428. Cro Ch. 173. 2. Eb. 623. 1. Bents. 70. 1 Hawkins P. C. 111. 30.

But ys rule ant universal.

60. But y correction must be reasonable, seems master ant justified He may be liable to y servant and as y case may be y public prosecution. The first rule however don't apply to all Servants. Those of y fifth class ant generally liable to correction. as Factors. Brokers Atty's. Ship masters &c.

Ibid. 2. Mod 167. 8. Bo 120.

And it seems to me yt ys right of correction extends to no other servants than such as belong as Servants to y Master family. For y right substantially y same as correcting one's children, and as I conceive, supposes y Servant to be under y Personal, domestic government of y Master.

61. The master undoubtedly has a right to chastise his slave for a reasonable cause. and also his apprentices, and. Minor menials or Servants.

The master may correct a slave or apprentice of any age. But if he beat any other servant of full age, he ants

justified and y servant may be discharged by y proper authorities –

In y last case y rule is y same, if y beating is by Master's wife –

A master cannot justify a wounding of y Servant, 12. he can't justify it by virtue of his right of correction, as Master, for he must chastise moderately or reasonably, if at all If then Servant sue y Master for assault and battery and wounding, he can't justify as Master, as to y assault and battery. only and shd plead not guilty as to y woundings or show some other sufficient cause, as necessary self defence –

Sicherb. 168. 2. Mod 154. 8. Co. 120. 218. 330.

The master must state in his justification, y relation. 12. y contract. y place where and y business in wh so these being essential matters –

The master cannot delegate his right of correction, for y authority is personal. I indeed y master sent his servant to school, y schoolmaster may correct him for a reasonable cause. But his (ie y schoolmaster's) authority can't strictly delegated by y Master – The schoolmaster's right arises from reason of duty he himself and not to y Master and is confirmed by Law. 9. Co 76. a. 2 Mod. 167.

⊕ Ld Ray. 62. 310. Str. 953. Cro J. 300.

If y master in correcting y Servant, kill him – he is guilty of excusable homicide, manslaughter or murder – kata y circumstances of y case – See Homicide –

1. Hawkins. 101. 111. Foster Cr L 262. Fleeting 65.
5 Mod 287. 1. Hales P Crown 454. 473. 4.
3 Bac. 567.

Of the Master's remedy vs Strangers for Injuries done to him in relation to his Servants.—

An action lies in favour of y Master vs any one who entices away his servant. The action is laid with a "per quod"

If y servant is taken away with force. [illegible] a per quod or y [illegible] action—

1 Wms. 469. 2 T Rs 167. 2 Ld Ray. 1032. Hob. 17. If no loss, y action is totally gone— Cro 55. Salk 380. note 2. Post [illegible] see Parent & child— Trespass on y case— So of a Journeyman employed to work by y piece— 6. Mod. 182.

So if a Servant without licence, leave y Master, without licence or just cause, and is retained by another, y latter knowing of y former retainer, an action for loss of Service lies vs y latter. Noy. 10. 106. 106. 2 Lev. 63.
3 Bac 557

But an Indictment enticement lies not for enticing merely— tis a private Injury— Salk 380. 3. Bro. P. 191. La Ray 1110.

But by a Stat of Court, y person enticing an apprentice an bound by Indenture or otherwise, forfeits to y master by way of Penalty, a sum not above 100£ This dont rust y Master's right to recover damages, for y loss of Service St Court B. 2. p. 118.

But if a Servant is beaten by a stranger, he alone may have an action for y Battery. If a loss of service is occasioned by it. Master may also have his action; for y servant is injured in his person, and y master by y loss of his labour, Recovery by one is no bar to y others action, for their rights and injuries are distinct. 9 Co 113 10. Bro. 131.
2 Bulst. 198. 1. Selwi 175.

The master in y case, must declare with the "Per quod consortium amisit" in the same respect of these there can be no loss of service. Cro J. 618. 2. Rolle 632.

* This is a very just & [illegible] action. Hob. 429. 9. Co. 113.

or minor child is a Servant within these Rules, and an adult child may be. Par. et Child 133 so when y child is full age has not been emancipated. Hence y action for seducing one's daughter with a "Per Quod" Pr. Par et Child 110.

If one beat another's Servant to such a degree, yt he dies, y Master has in Eng. no remedy. The Private Injury is merged in y Public [illegible]
Yelv. 83. Ray 339. 2. Rolle 568. 3. Bac 568.

If a Servant's wound be injured by a Surgeon unintentionally, so yt y master loses his service, in consequence of y improper treatment, an action lies by y Master vs y Surgeon
2 Bulst. 332. 1 Rolle 98. 3 Bac 568. 1. Rolle R 134.

Suppose y injury done thro' negligence or want of skill, wd y action lie for y master? For y Servant certainly would. Trespass. 8. Lo Ray. 214. 2 Wils 358.
1 Rolle 90. 8 East 348. Bro B. 601.
In y case of Servant enticed away or leaving his master without licence & retained by another person, knowing of y former retainer. ante 63.4. a recovery had and full satisfaction by y master vs y Servant, is a a bar to y Master's action vs y Stranger — who enticed or retained y Servant, for y Master can't have but one satisfaction — 1. Bl R 387. 3 Burr 1245.

07. Quere, an a recovery wthout a satisfaction is a bar in y last case.? I think they ant considered as It Tort Does.

What acts the Master or Servant may Justify in each others Defence –

The master may maintain (i.e. abet and assist) y Servant in an action of a Stranger and it isn't maintenance.
– 3 2. Rolle 115. 1. Ble. 429.

A Servant may Justify an assault in defence of his Master – Tis a part of his Duty. Salk 407. 2. Rolle 546. 1. Ble Com. 429. 3. Bac 568.

This right grows out of y relation of Master and Servant – and therefore he can't justify an assault in defence of y Master's son, not being to him a Servant –
3. Bac 568.

Nor in Defence of Master goods.

If they are in y Servant possession, I think he can justify force –

Whether a Master can justify an assault in defence of y Servant, is questioned, because he may have an action for y loss of Service – 3 Bac 568. 2d Raym 62. Salk 407. 1. Ble. 429. Saund. on pleading 124. 5.
I think y to be no reason –

But Quere.? is it so a safe reason, The opinions are contradictory. The Master's interest seems to Justify him – Besides it seems to be his duty to protect his Servants –

I think y right reciprocal –

A servant can't avoid a deed obtained from him, by duress of his Master *. The relation ain't sufficiently intimate. 1. Rolle 687, 3 Buc 568.

But probably Equity might interpose in his favour. as for fraud or surfaneß.

* He can by duress of himself.

Finis.

Master and Servant

I^st Slaves. 137. II Apprentices 141. III Menial Servants. 148. IIII Day Labourers. 149.
V Agents. 149 – Rules applying to Master & Servant generally. When y Master is bound and take advantage of y acts of y Servant. 154. Contracts of Servants, when they will subject y master. 162. How far Servant is liable for his acts & defaults to Strangers & to his master 166. Masters Authority over Servants. 170. Masters remedy vs Strangers for injuries done to him in relation to his Servants, 172. What acts y master and Servant may justify in defence of each other. § 174

Guardian and Ward

Guardian and Ward –

The different kinds of guardians and their rights and Duties 20.

A guardian is a temporary Parent i.e. a person in loco parentis, for certain purposes, during the child's minority. A child under a guardian is called a Ward. 1 Bl. 450.

In ord. the guardian has the charge of the Person and estate of the ward. i.e. he is under the care of one Guardian – But the estate may be under the care of one Guardian and the person under that of another – 1 Bl 460. 72 – 1 V. 20

They are instituted officers under the Law. and the person exercising them are called Tutor and Curator –

The Law of guardianship, if I'm not mistaken, is one unsettled in any portion of the Law, and it difficult to be understood – I explain the different kinds, not because they have obtained in our country, but quia its important to understand them –

First. The Different kinds at C Law. are 4. 21.

First. Guardian in chivalry. This obtains only where an estate holden by knight service is vested in an Infant by descent – It continues over males till 14. and over females till 16 or marriage – It extended to the person and lands within the Guardian's Fee – The Guardian wasn't accountable for the profits – It was abolished with the military Tenures in Eng at the time of the Restoration in 1660 1660 12. Ch. 2. 1660. Co Litt 88. n. 11.

It aint known in the U S. vide Hargrave Notes on Guardian.

2 Bl 67. 8. 56.

Second Guardian by Nature Some books mention the kind of Guardianship, as if it were an incident to the Father, thus as if confined to Parents. – 1 Bl. 461. 3 Co 38. a. 6. Co. 22. B –

122 But the Father, Mother or any ancestor may be guardian by nature at C Law. The Father's claim excludes all others – The mother is second – 3 Co 38 a – and among more distant ancestors, if two have equal claim (as if the Infant is heir apparent to his Paternal or maternal

Co Litt 88. B. note 12.

Grand Father) ~~[illegible]~~ in possession of the Person seems to decide y difference or rather preference—

It extends only to y heir apparent only to y heir apparent of y ancestor and not to other children, Ideo, que in in Eng, a daughter subject can be subject of d, as she can be but heir presumptive. 2 Litt 84. a. 85. B. n. 12. Cart 375.

This kind of guardianship extends only to y Person, and not to y estate, and continues tile y Ward is 21.

In Const ale ones hel— are heirs apparent and y most extends to both y person and y state— Post 130.

123 In Eng. y Father may suspend y claim of ale y ancestors, by appointing a Testamentary Guardian— Co Lt 12. Ch. 2.
Post 128

When y Father was natural Guardian, a person of y sort belonged to him in exclusion of y Rights of y Guardian in Chivalry, Secus when any other Ancestor was natural Guardian.

In Eng y Parents are stiled natural Guardians of all their children. By yo is meant, not that they are natural Guardians at C Law. but such as y Law of nature designates as proper Guardians, and when there is none provided by positive law y Chancellor in his discretion settles y Guardianship on y Father and on his death, on y mother—

124. 3. Guardian in Socage— This species springs liked yt in Chivalry from nature, and takes place only when an Infant under 1. Bl 461.2. Co Lt 87. b. 14. is seiser of Lands, derived by descent, and holden by 88. n. 13. 2. Mod. 170. Socage Tenure—

It belongs to y nearest of y Infant kindred, to whom y Land can't possibly descend, yt there may be no temptation to abuse y Trust. 1. Bl. 461. 2.

among claimants, there is no distinction between y whole and y half blood. If two or more Kindred claimants are in equal degrees, y priority of possession decides between them — nor yt among brothers and Sisters, half blood is preferred, y eldest is preferred, and among Lineal ancestors, males are prefered — 125.

The Guardian in Socage, may lease y wards estate, till he's 14. and maintain Ejectment in his own name —

Guardianship in Socage, extends to y Person, y Socage Estate to Incorporeal Hereditaments, and, (it seems) to personal property y custody of y Person drawing after it, every species of Property. Co Litt 87. b. 89. a. n. 3. 1 Rolle 40. Hutton 17.

126. The Trust ant assignable like ys in Chivalry, for his for y Infants benefit, That of Chivalry ait for y Wards benefit.

At 14. The ward may enter and oust y Guardian and occupy y Land, y Guardian is accountable for y profit and allowed his Reasonable expenses. Litt S. 1. 23. 1. Bl. 451. 2

At 14. Infant may choose a Guardian — ante and Post 129 —

Guardians in Socage may be superseded by y appointment of a Testamentary Guardian — Co Litt 39. n. 13. n. 14.

These different kinds of Guardians have been established, yt all kinds of children might have Guardians, IE. children under different circumstances, wh are qualifications to y different kinds of Guardianships —

4. Guardianship for Nurture — This takes place only where there is no other Guardian, it ceases [illegible] and [illegible] are [illegible] at y age of 14.

1. Bl. 461. 3 Co 38. Co Litt 88. a. n. 12. 89. n. 13.

[illegible] y Father or Mother. Does it [illegible] take place w. a rei. absent? it seems not, for if there [illegible] a Parent, he or she is natural Guardian in yt case. Co Litt 21.

12. Ante 14. If there is no Guardian in Chivalry, and there being none in Socage, who is Guardian to ye younger children? I suppose one appointed by Ely or chosen by ye Infant.
Post

The three last species of guardianships, may be ousted by the appointment of a Testamentary Guardian. Guardianship in Chivalry was abolished by ye same St, yt established testamentary Guardianships.
Where can there be Guardian for nurture in Comm. Post 185.

III. By ye St 12. Ch. Sec. a father, an himself of age or not may by will or deed appoint, with two witnesses, a Guardian for any or all of his children, who are Infants and unmarried, and even to Infant, in "ventre la Mere" The appointment may be either in possession or remainder. It may continue, till 21. or terminate before ye age, This Guardianship extends to ye Person, and all ye estate. It supersedes all others.
2. P Wm 110. 2. Wils 129. 1 Bro 462. 1. P Wm 702.

A Testamentary Guardianship not assignable, for ye Trust is Fiduciary, one may but cannot assign — As to Guardians by St 4 & 5. Phil and Mary — for females under 16. See 3 Co. 39. a — 39. a — Co Litt 89. a 89 — n. 14 — 3 Bro. 417. 3 Rac. 6/5.

IIII As to Guardians by Custom. see Co Litt 89. n. 10.

IIIII. Guardianships not enumerated by ye old Law, writers and are now known to ye by Law, viz i, are First. By Election of ye Infant. a kind not known to ye ancient Law but claims in ye country, This takes place only where there is no Guardian appointed either by ye Law, or by ye appointment of ye Father — Example. no land holden by knight service, nor by Socage Tenure. or if any, ye Infant being ov. 14. nor for nurture, he being of ye age of 14. not Heir apparent — So no natural Guardian, and finally no testamentary Guardian —
Co Litt 87. b. n. 16. 88. n. 14.

This kind of Guardianship is of late origin, however it has been in use ever since y restoration 1660. and it seems before, The election is said frequently to be made before a Judge, on y Circuit.

In Eng. there is no particular form of electing a Guardian. 130.
Ld Baltimore when 18. named his Guardian by deed, Quere is a Parol Election good? I think y Chancelor has y Power, to agree or disagree to y Infants choice, for y law can't be so inconsistent as to allow y Infant to appoint one absolutely.
1. Ves 375. Co Litt 87. 89. n. 16.

The age for choosing is said to be 14. in Eng.* Yet it is said, y Choice made before or after yt time ante 26. *Co Litt 89. n. 1 Bl. 463. 90.

Indeed tis said, before y restoration 12. Ch. 2. y practice of choosing Guardians, was almost confined to ~~Goods~~ Infants under 14. The C.L deeming a Gardian of that age, in a great measure unnecessary.
Co Litt 89. n. 16. 1. Bl 463. 90.

Second. Guardian by y Appointment of y Chancellor. yo kind 131.
is also of modern date, it seems. Gilb Eqty Pl 172. 1. Bro PCs 544
But y Ct of Chy has exercised y power of appointment, ever since y year 1660. without opposition
The Chancelor never exercises yo power, however, when y Infant is otherwise provided with a proper Guardian. When he aint provided for, y power of Chy is very extensive. Its authority in a great measure discretionary and extends as well as to y appointment of Guardians — to y removal. Vide Lofpy Ld Ray 480. 1096.
1. P Wms 763.

The Chancelor may remove even a Testamentary Guardian — 2 Bl 233. 1 Ves 160. 1 Bl 462
So y Chancelor may appoint a Temporary Guardian, may compel any guardian to give security, and may make him Pre Chy 106.
discretionary or absolute as to y Interest of y Infant, or as to his state. But he has no such power in Court, but it Ld Bl 480. 1096.
may exist, in neighbouring States, where there are distinct Cts 1. Ves 160
of Eqty. as to ye. Quer 2 Bac. 079. & Ibid — Co Litt 89. 1. P Wms 703.

3. Guardian by appointment of ecclesiastical Ct.

2 Levin 132. 3 Ch Ca 384. 3. Burr 1496. The law as to the power of the Ct to appoint, ant fully settled, & I mean the right of appointing for the personal estate, an also, there being no other, This right "was a personal power" was always denied. 3 Atks 531. Co Litt 131. 132. a. b.

133. This right has lately been denied as to the personal estate of an Infant, and when yet such Ct can appoint "ad litem" only.

4th Inst. A Guardian ad Litem – is a special Guardian appointed for a particular Suit, when an Infant being Def has no Guardian ante 61. 66. He may be appointed in any Ct in wh an Infant is sued. Co 89. n. 16. 3 Bl 427. 2. Lev. 136. 5. Co 53.

The King may appoint a Guardian ad Litem by letters Patent, but the practice has been long disused. Co Litt 89. n. 16. Richards. 27.

134. In Comnt. A Guardian ad Litem is never appointed for an Infant Plff. Cub Ct 1802.

In Eng. can Children having no C Law Guardian, elect one at 14. (when guardianship for nature ceases) living the Father? or how are they provided for? at C Law? The Father, Forsthorne, continues natural Guardian. of them all Rata the import of the in Equity and the Chancellors settling the Guardianship upon him when necessary –

Now Indeed the St 12. Ch 2. has given the Guardianship in such cases to the Father.

135. Under the Comnt Law there ant any Guardianships in Chivalry, in Socage, by Testament. by Custom, by appointment of the King or the ecclesiastical Ct.

Those known in Comnt Law are First. Natural Guardian 2? by appointment of Probate., and, ad Litem –

Guardianship for nurture, cant think, exist in Comnt. for the Father is natural Guardian to all his children, and the mother, is so much Guardian to ally as any, indeed all are

are heirs apparent, ante 122.

Natural guardianship of y Father' continues in Scotl, till they attain 21. and extends as well to their property as Persons—

In y Father's death, y mother usually acts as Guardian but another may be appointed for y male children, during her life, as a matter of course without from y disposing her, 1. Bell 131.2. When it shall so happen, yt there shall be any Guardian, without Father, Guardian or Master, says Comst St 373. no mention being made of y Mother, but even in yo case y Infant lives generally with y mother, but if appears she ain't Guardian "de Pure." 135.

Holden, yt y mother (y father being dead) is y natural Guardian, to her female children, till they attain y age for choosing, By what law is yo distinction created between Males and Females? 2 Rood 320.

But in Comst, (living y Father) another Guardian cannot be appointed, in y former is removed, and yo can be done only for special purposes or reasons and not of course. Comst St 373.

Now for Father's right appeals to y appointment of a Guardian— 137.

Comst St 374. The mother then don't be ~~of~~ Comst Law, seem to be of course or of right, guardian to her male children, (is the guardian any more of female than of males?) for of whatever ages, ~~another~~ they may be) another may be appointed of course, tho' the is frequently y person appointed, y father being dead. 1. Rood 131 2.

In Comst. if an Infant has no father, Guardian or Master, tho' y int of y Ct of Probate to appoint one, if y Infant is of y age of choosing (14. 12. St 42.) y Ct is to summon him to appear, and make his election. But his choice tho' to be regarded, don't control y Ct, who may appoint a different person— Comst St 378.

If he don't choose, y Ct appoints one kata its discretion— 138.

If a male Infant (as not y same as to Females) under y age for choosing, has no Father, y Ct of Probate may appoint without summoning y Infant to attend, for he can't choose. But yo ain't usually done,

(y mother living) ni application is made to y Ct for y t and purpose.
In Connt. The Ct of Probate may indence y tutor, for cates sur, as they may in England.
It seems, y Ct may appoint, as often as occasion requires,
The 2. paragraph enables y Ct to appoint, when y other is dead.
Connt St 2, 3. 2 Port 323.

139. In Connt it has been resolved, yt y ward has a right to live with his Guardian, and can't be removed by y own.
Quere? he be once changeable, for he years no settlemt. 5 Post 154.

under y old St rule relating to settlemt, acquired by
yt he might be removed with being changeable,
y rule wd seem correct. But in case of his being actually changeable, both y young concerned have an interest in removing him, and to forid, wd seem opposed to y spirit of Connt Law — and really an invasion of Town rights.
In Connt a guardian appointed to an Infant, under y age of choosing, continues of course till y age of 21. ni y Infant chooses another to y acceptance of y Ct. Kirby 284. 86.

Connt Law requires y Ct of Probate to take security of all Guardians appointed by him for y faithful discharge of their duty, to oblige them to account, give account with y Ct or Ward, when he attains full age or sooner, if y Ct or complainant shall require it, the bond must be with security, if he has state.
140. But in Connt y Guardian's Mrs appointed, is not liable to be sued to account to y Ward, (while a Minor) ni called upon by y Judge of y Ct of Probate to account. 1 Root 512.

By y Eng Law, also, all Guardians (ni in Chivalry) are compellable, to account for y Ward's property in their hands. Co Litt 89. n. 12. Co Litt 89. n. 9.
And as species of Guardian hip being abolished. (ante 121.) y rule extends to every Guardian of his property.

The usual remedy in Eng. is by bill in Eq., so proceeding
being more ready & remedial, yet an account at Law
in compelling a discovery under oath, production of books &c
the ye action of account will ~~account~~ also lie. Co Litt 88. n. 9.
1. Bl. 463. 2. Bos. 67, 387.

In Eng. it aint uncommon for Eq to compel ye Guardian 141.
to account annually, especially if ye estate is large — 1. Bl 463
yet Court ye usual remedy is by action of account, where
nearly no remedies in ye State w a bill in Equity in England —
or ye Guardian is bound to produce papers and disclose —

If ye wards estate is in danger from ye Guardian's mismanagement,
ye latter (tho' his Parent) may be compelled to account any time —
1. Eq Ca 137. 260. 2. Mod 17.

In case of misconduct by ye Guardian, Eq in Eng, may remove
him, so if there is reasonable ground to fear misconduct, ye Ct 42.
may order him to procure security and upon refusal, displace 1 Ves 38.
him. 1. Salk 44. 2. Mod. 17. Bl 463. Bern. 442. 1 Eq Ca 261. 2. P Wms 1020.
Indeed, ye Chancellor in such cases acts discretionally and makes such
orders as he thinks proper —

No Guardian, ni Parent, are bound at their own expense 1 Bos & Pul
to maintain their wards, but may apply ye Wards Estate. 387.
But a Parent, when Guardian, is obliged to support ye Ward 3 Atky
and if he is of ability, Eq won't allow him to apply any of 399.
ye Ward's Estate for his education nor maintenance — 1. Bern 255.

Qeuo if not of ability. He may then by leave of Chancellor 143.
apply ye ward's estate, but it must be a case of clear necessity
to warrant such permission of ye Chancellor — Ibid Coller 328.
3 Bry Chy 60. 4 D. 225. 2 P Wms 21. 1. Ves. 160.
3 Ves Jr 733. 15 Do 120. Atk 60. 399 —

But a widow having married again, aint bound to support 1 Ves 160 n

her children by a former marriage but she may & ought their estate, remains y Second husband not virtually be charged with their support. She is a Feme covert and has no property.
ante 38. Post. 154. 1. Bro. Cy 268. Contra 2 Ventris 363 overruled

It has been said, yt for any more yn ordinary and necessary expences, in maintaining a child, y Parent may apply y child's estate, if y object is for y childs benefit and y expences are reasonable & money advanced for a childs apprenticeship to a useful Trade.
2 Vents 353. 2. Vern 187. 255.

V. ON GUARDIANS.

144. The last rule has been denied, by Ld Hardwicke, in y case of apprenticeship, Clerkship. 3 Atk. 330. Bunbury 130.
Vern 150.
Under permission of y Chancellor he may apply a part to y childs education, and I think Ld Hardwicke denied subject to yr qualifications.
Surely must not every case of yt kind stand on its own bottom & circumstances? The Chancellor gives the permission or not, in his discretion.
In Court when y interest of an Infant heir is necessary to be reconveyed on a bill for Redemption, y Guardian is empowered by St to make a reconveyance, and may be compelled to do it, under a Penalty, and if y Infant has no General Guardian y Guardian "ad litem" appointed by y Ct, is authorised to reconvey. Ct Comm Guardian

145. By Eccl Law, y Guardian of Infant heirs, of a deceased St Tenant or Tenant in Common is empowered with y assistance of such persons, as y Ct of Probate shall appoint, to make partition of y Land.

In Eng. tis said, y Guardian or Prochein Ami, may bind y Ward by equal partition 2. Bac. 634. 2. Hale 255. Lucas & Burr 1801. yt y Infant may do it. ante 21.

if y wards ~~creditor~~ creditor, in a compromise, accepts from y Guardian less yn is due, y Ward and not y Guardian has y benefit of y discount for he acts for y ward — 2. Bac. 687. 2. Chy 240.

The Guardian is considered in Chy, as Trustee to y Ward 146 — and if a stranger rationally enters upon y Infants lands, and takes y profits, he is compellable in Chy to account as Trustee or Guardian, or he is liable as a Trespasser, at y election of y Infant, but ys can happen only in y case of Infants, 1. Rol 661. 1. Eq ca. 2. 280. 2. Bern 295. 342 — 1. Atks 489. 1. Bern. 435.

The Guardian must allow interest for y Ward's money — in his hands, nor he shows yt interest cd not be obtained for it — 2 Ves 629.

(1 Eq ca. 280) (2 Bac 687)

Tis duty of y guardian having personal property of y Ward, to pay debts, charged on Ward's estate, out of yt property, and not with his own — This rule is to prevent interest accruing on y debt vs y Ward — 1. Chy Ca 156.7.

And if y wards estate is in mortgages, y Guardian ought to 147 apply y profits of y estate, to y interest, and if it will more yn do ys, y remainder to discharge of y Principal — 2. P. Wms 2.9 —

The guardian has no power to vest y wards money in Lands, 1. Ab 231 — But if he does it, (taking a deed in y Ward's name) y latter may at full age take either at his election, tho if he takes y money, he is obliged in Chy to reconvey y land to y Guardian — 1. Bern 435.6.

But if in such case, y ward dies without making his election, his Exec. shall have y money, for y right of election being personal, his heir cant claim y Landy 1. Bern 403.35.

148.

In general y guardian in accounting for y Ward's money is obliged to pay only principal and interest — But if y money was directed to be appropriated in a particular way — as in y funds, any y Guardian has made it in another, as Trade, y ward has at his election, y interest or profits — 2 Ves 629 —

2 Ab 231.2 —

As to marriage of Wards, y Chancellor of Eng exercises an authority never claimed by any of our Cts, He forbids marriage without consent of y Guardian, and even if y Guardian does consent to an unequal marriage at his discretion and punishes as for a contempt, the those who assist in y marriage after y prohibition This dont Regard, as I conclude, wards under Guardianship of Parents. Talbot 58. 2. P. Wms 111. 562. 1. Bes. 180.

140. So if there is only an apprehension of y wards being married, to his disparagement, tho with Guardians consent y Chancellor will prohibit it and secure y person of y Ward, if necessary — and even on oath of y Guardian or y other party, I not to allow it — 2. P. Wms 112. Talbot 58. 3 Atkins 704.

So y s authority over exercised, when either of y Parents is Guardian? In Court, data usage, Guardians may bind wards as apprentices. The Guardian's Power over his Female Ward, is said to be at an end on her marriage —

Quere as to her Property, wn he is of full age, wn wh case he becomes virtually her Guardian — ante 6. 1. Bes. 91. 180 —

not So of Walls, 1E. quaad their Property, y guardianship continues — 1. Bes. 91. 180.

150 Settlements of Infants.

For y Comm Law respecting y acquisitions of original settlements by Persons, in their own rights, see St Comst 394.

First under Comst St. no foreigner, 1E. not an Inhabitant of y US or any of y Ts — can gain a settlement in any town in y s State, wn admitted by y vote of y Town, or by y consent of y Civil authority, or Select men — or wn he is appointed to, and executes some public office Comst St 391 — Secus he may be warned to leave under penalties prescribed by St Comst 92.

2. No inhabitant of any other of y U S, can gain one, wn he has one of y above qualifications, or wn possessed in his own right, ~~as a Fee~~ in Fee, within y State and during his continuance. § of Real Estate of y value of 334. and shall have owned y estate and resided in y town at least one year, before, &c, otherwise he

may be warned as above or transported to his own state —
Comm Dig 321-2. 2 Black 142.

51. 3d. No Infant of one town in yr state, can gain a settlement in another, nr he has some one of the qualifications post mentioned — or nr he has in his own right in Fee, real Estate of y value, of 100 £ in y town, or nr he has supported himself thirty yrs, (under y old law before 1792 - y period was one year) and paid all his taxes — But within yt period, he can't be removed, nr he has become chargeable to y town.

Other Modes of gaining Settlements are First
At C Law. by birth, The place where a child is first known to be, is prima facie, y place of its settlement, & deemed to be y place till another is shown to be, — Comb. 304. Salk 485. 362. Carth 433. 1 Ld Ray 567.
This is generally y place of a Bastard's settlement in Eng. 152.
ante 84 no mother
And in cases of Bastard children, if neither father, has a settlement in y realm or county, y child is settled in y place of its nativity. Car. R 433 - Comb. 364. 1. Bl. 352. 3. 1. Ld Ray 567.

But in y case of legitimate children and (under Comt law) of illegitimate also, ante 85. y presumption may be rebutted, The rule is y same in certain cases as to illegitimat children, in England, 1 Bo 303 -

Secondly. Settlement by way of Parentage The settlement of y Father or maintaining Parent being yt of y child -
Kir 302. 5 Day 169. Tait 528. Ld Ray 473 3 T R 114. Burr Sett 2. 3. 1. 2 -
3 Comm 600.
The last rule holds in Eng. as to legitimate children only. 1. Bl 362. 3. 458 - Ta 2 427.

In Comm bastards are settled with y mother and not with y putative father, ante 84. Settlements are acquired by parentage are called derivative. 3 T R 10.

The settlement of Legitimate Infant children, in immediate, ulay follow ye Parent, & ye latter acquire a new one, ye immediately communicated to his Infant children.

Str 438. 881— 3 T.R. 114. 116. 8. Co. 47. 4. Co. 118
3. Esp. 1. Burr Settl Cs. 49-04— 217. 538—

154. After Father's death, it regularly follows ye mother.

Scew in Eng, where a widow having children marries a second husband; for he is bound to sustport them, tho' if under 17. they go with her, for nurture— ante 99. 100—143—
La Ray 1473. 395. Burr Sett Cs 49-64. 372.
3 Salk 253. Doug 8.— Tauk 470. 528.

The usage of Connt is said to be Scew— See Quere ante 99—

In Conn a Pauper gains no settlement by living with his Guardian appointed by Probate, tho' he has a right to live with him ante 139. 1. Root 132. Clarkson vs Hebron 2. Con R. 181

By acquisition of a new settlement, ye old one is lost, but in no other way, ie. one cant actually hold 2 settlements, at ye same time, tho he may have ye necessary qualification, in two or more towns or Parishes, as a Freehold in two towns, and may reside in either. 1. Bl. 263— Burr set Cs 3. 5. Salk 528. 29—

An Infant may under some circumstances, gain a settlement in his own, ye nonnonage and then his derivative settlement is lost. As an Infant apprentice in Eng—?

As gaining a settlement, works his emancipation ie. he is no longer a Servant to his Father, and may take his emancipation, if he pleases, and he must be supported by a new Settlement as he is severed from ye old one—
La Ray 567 3 T.R. 110. 356. 3. B.C. 364

In Connt, an apprentice dont gain a settlement by living with his master... 1. Root 181. 2.

After a child is manciपated i.e. after he ceases to be considered in law, as belonging in y character of servant, in y Parent family, or being under his care or government he can't take y benefit of a new settlement, acquired by y Father, and y rule, that holds 8. Mod 470 - even tho' he continues to live with y Father — 3 T R 16. 350 - 5. Mod 383.

Burr S C. 270. 638. 1 Wils 123 — 1. East 526 -

Emancipation of an Infant may be effected. First by full 150. age. Burr SC 270. 1. Wils 273 — 3 T R 350.

Second. by marriage. He is exempt only as to his person 1 East 526 - and not as to his estate. 5. T R 583. 3. Mod. 1. Str 438 - 831.

Third. By gaining a settlement of his own, as apprentice 3 T R 350 -

Fourth. By contracting any relation inconsistent with his remaining under y care and government of his Parent. as yt of a Soldier, long enough to sever him from y Father's family — Burr SC 638. 5 T R 478 - 6. Mod 247.

First. But attaining full age, ant an emancipation, if y party continue a member of y Parent Family, i.e. continues a servant under y domestic government of y Father — or Parent. But supposing he boards as a Guest with y Father, in yo case. I think, he wd be considered as emancipated. 6. T R 252 - 2. East 270 - 7. Mod. 526.

Second. Settlement acquired by Marriage — Str 544. Salk 528. 1. P. 303 — On y husband's marriage, his settlement is communicated to his wife, y Law not permitting y separation of Husband and Wife. Burr SC 122. 371 - Kirby 203 -

If a woman settled in Lichfield, marry a man settled in Georgia Georgia becomes her settlement, and the "Jus Facti" loses her maiden settlement. Salk 528. 3. 1. P. 363 — Burr SC. 122 - 370 -

And it has been decided, yt if y Husband have no settlement, as if he is an alien, here is suspended during coverture, but revived on y husband's death. Burr SC. 122 - Str 544. 683 - 1. Root 232 -

But it seems now settled, that if the Husband, (having no settlement) dont remain in the realm or being in the Realm, dont remain with and support her, her maiden settlement continues. Indeed, it held unconditionally that if he had no settlement, her is not suspended.

Burr Sett Cas 357. 70. 2.3- 122.

And in the last case, her children by a marriage are entitled with her, to her maiden settlement.

Finis of Guardian and Ward.

[illegible]

Contracts

1. A contract is defined to be an agreement between two or more parties, for a sufficient consideration to do or not to do a particular thing. 1. Bl. 443. 2. Ib. 446. 3. Ib. 446. 4. Ib. 446. 5. Ib. 446. 6. Ib. 446. 7. Ib. 446. 8. Ib. 446. 9. Ib. 446. 10. Ib. 446. 11. Ib. 446. 12. Ib. 446. 13. Ib. 446. 14. Ib. 446. 15. Ib. 446. 16. Ib. 446. 17. Ib. 446. 18. Ib. 446. 19. Ib. 446. 20. Ib. 446. 21. Ib. 446. 22. Ib. 446. 23. Ib. 446. 24. Ib. 446. 25. Ib. 446. 26. Ib. 446. 27. Ib. 446. 28. Ib. 446. 29. Ib. 446. 30. Ib. 446. 31. Ib. 446. 32. Ib. 446. 33. Ib. 446. 34. Ib. 446. 35. Ib. 446. 36. Ib. 446. 37. Ib. 446. 38. Ib. 446. 39. Ib. 446. 40. Ib. 446. 41. Ib. 446. 42. Ib. 446. 43. Ib. 446. 44. Ib. 446. 45. Ib. 446. 46. Ib. 446. 47. Ib. 446. 48. Ib. 446. 49. Ib. 446. 50. Ib. 446. 51. Ib. 446. 52. Ib. 446. 53. Ib. 446. 54. Ib. 446. 55. Ib. 446. 56. Ib. 446. 57. Ib. 446. 58. Ib. 446. 59. Ib. 446. 60. Ib. 446. 61. Ib. 446. 62. Ib. 446. 63. Ib. 446. 64. Ib. 446. 65. Ib. 446. 66. Ib. 446. 67. Ib. 446. 68. Ib. 446. 69. Ib. 446. 70. Ib. 446. 71. Ib. 446. 72. Ib. 446. 73. Ib. 446. 74. Ib. 446. 75. Ib. 446. 76. Ib. 446. 77. Ib. 446. 78. Ib. 446. 79. Ib. 446. 80. Ib. 446. 81. Ib. 446. 82. Ib. 446. 83. Ib. 446. 84. Ib. 446. 85. Ib. 446. 86. Ib. 446. 87. Ib. 446. 88. Ib. 446. 89. Ib. 446. 90. Ib. 446. 91. Ib. 446. 92. Ib. 446. 93. Ib. 446. 94. Ib. 446. 95. Ib. 446. 96. Ib. 446. 97. Ib. 446. 98. Ib. 446. 99. Ib. 446. 100. Ib. 446. 101. Ib. 446. 102. Ib. 446. 103. Ib. 446. 104. Ib. 446. 105. Ib. 446. 106. Ib. 446. 107. Ib. 446. 108. Ib. 446. 109. Ib. 446. 110. Ib. 446. 111. Ib. 446. 112. Ib. 446. 113. Ib. 446. 114. Ib. 446. 115. Ib. 446. 116. Ib. 446. 117. Ib. 446. 118. Ib. 446. 119. Ib. 446. 120. Ib. 446. 121. Ib. 446. 122. Ib. 446. 123. Ib. 446. 124. Ib. 446. 125. Ib. 446. 126. Ib. 446. 127. Ib. 446. 128. Ib. 446. 129. Ib. 446. 130. Ib. 446. 131. Ib. 446. 132. Ib. 446. 133. Ib. 446. 134. Ib. 446. 135. Ib. 446. 136. Ib. 446. 137. Ib. 446. 138. Ib. 446. 139. Ib. 446. 140. 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2. The assent of parties is y essence of every contract, without it there can be no agreement, and of course no contract, obligation created or dissolved. 1. Pow. 9. 2. Bl. 442.

To yield a legal assent, y parties must be legally capable of contracting.

Hence a person non "compos mentis" as an Idiot, Lunatic &c, a Lunatic, cannot regularly make a binding contract. He has no understanding and therefore in legal judgment has no will. There is no moral agent where there is no intellect.

In general all contracts, not of Record, made by

such persons, are actually void, says Pow, and y better opinion, is, he says, "non est factum" may be pleaded to ym. 1 Pow. 11. 12. + Co 123. 2. Rol 728. Show Pl. 182.

PG. thinks, non est factum, cannot be pleaded, but yt it must be specially pleaded, Sed. see 4. Bac. 87. 4. Co. 123.

Post. 4. Supra. They seem void as to some intents, but not as to all.

They are void as to some intents. Thus y surrender of a particular State by a person "Non Compos" mentis, doth destroy a contingent remainder depending, but it is strictly void as to yt purpose. 1 Pow. 12. 3 Mod 280. 301. Salk 576. Sa Rac 3.10. 3 Lev. 204. 2. Vent 138. Carth 211. 250. 435. Comb. 438. 68.

Sed Quere as to such persons deed, cannot "non est factum" be pleaded to them? Salk 675. Ep. 223. + Co 123. Str 1104. 1. 557. Bull N P. 172. 4. Bac 87.

The opinions are contradictory, but if not, y deed may still be void.

3. But persons insane are competent to receive property by a derivative Title, by Gift - Devise. &c, as well as by descent. there being his said a presumed assent to what is thus in common presumption, beneficial to y Party because he cannot assent. Co Litt 2. B. 2. Vent 203. 1. Pow. 13. 14. 3 Bac 84.

Wd it not be more proper to say, yt in such cases y Law dispenses with y consent required in other persons? There is no fiction nor obscurity at any rate, he may acquire property by purchase, as well as by descent.

And if y insane devisee or donee recovers his understanding, and he agrees to y purchase, his assent becomes sufficient but if he dies during his insanity or having recovered his understanding, dies without agreeing to y purchase, his heirs may avoid it. 1 Pow 13. Co Litt 2. 2 Vent 203.

as they may avoid it. So if he recover his understanding he may disaffirm it. This surrender are not void but voidable.

But the contracts made by a person non compos mentis, to alien his property or to create an obligation upon himself, there is no presumed assent, nor is a legal assent dispensed with. 1 Pow. 14. These fall without ye General Rule, yt these contracts are void. They ain't deemed beneficial to him.

4.

As to those however it appears to be a rule of ye Law, yt ye person "non compos mentis" cannot when recovering his understanding, take advantage of his prior incapacity. Contra 2 Vent 198. B N P. 172.
" No man of full age shall disable his own person or ad it is frequently wrested, duly by himself." (Maxim)
Litt S. 405. Cro Eliz 398. 1. Pow. 14. 20. Cro Eliz 622. 4 Co. 123.
3 Bac. 87. 1. Sanders 41. to 43.

The weight of authorities are in favour of ye Rule, in ye intent, they ain't void, tho' voidable in law.

This rule is founded on supposed reason of policy. 1st. to prevent fraud by pretending insanity. 1. Pow 20. 3 Bac 87. 4 Co. 124.5.

The reasonableness of ye Rule may well be doubted — (& think ye danger visionary (P.G.)

In Canon, this a rule yt one may aver his prior insanity to avoid a bond. &c. 3 Day 90.

And at C Law. after ye death of such person, his heirs or Ex'rs might void his contracts of ye testator.
4 Co 124. 5. Cro Eliz 398. 3 Bac 87. Tickers. 202.

There also 2. modes in wh such contracts may be avoided, during his life by ye Eng. Law. First upon ye found. upon ye writ de idiota inquirendo" or de lunatico" the King is bound to take notice, during ye party's life avoid all alienating, yet the act in "Parl" 12. not of Record. of ye ideot during his incapacity. This since found bad relation back

5.

[illegible] commencement of Lunacy. 1. Ros. 248. [illegible] 4 Co 126. B. 3 Co 18. 8. Cro. 88. "Cum omnia mala [illegible] of ice found" may be avoided. "Ice Tuna means a verdict of fact in ni mainity after ne of King may cause of [illegible] Fuscus. "ut tuta" [illegible] Const [illegible]

[illegible] bill [illegible] may be sued on the, for of same purpose [illegible] Atty General, or [illegible] Committee of [illegible] 12. his overseers and [illegible] made" [illegible] be a [illegible] to [illegible] Bill. Nor he may not nullify himself.

2. Rem 414. 1. P. Wms 105. 111. 3 Atks 170.

1 Pow 26.7. 1. Eq Ca 279.

But if a Writ on the is brought in behalf of a Lunatic, to compel performance of a contract, made with [illegible] care, he ought to be made a party, for it not just that to nullify himself, or to take advantage of his Incapacity, but to enforce his own. The Committee is but his Bailiff. 1. Pow. 239. 1. Ch Ca. 153.

If a Lunatic make a contract during a Lucid Interval, he & his representatives are bound by it. 4 Co 125. A.

2 Rem. 412. 414. 1. Pow. 29. 3 Bac. 83.

2. Lunatics, Idiots, are bound, like other persons, by acts and contracts of Records, as Fines & Recognizances, nor are they avoidable by their heirs, or in any other way. Nor no averment can be admitted against Record.

1. Pow. 21. 22. 4. Co 124. Co Litt 247. 10. Co 42.

An Idiot is a natural Fool, 1E. who has had no understanding from nativity. 1. Bl 303. 3 Bac 78.

It is said of one who has any understanding as one who can tell his age, his Parents, or days of the week, or can count 20. not an Idiot. 1. Bl 304. Fitzherb. 233. 3 Bac. 79.

A Lunatic is one who has had an understanding, but has lost it from some supervenient cause.

4 Co. 123. 1. Bl. 304. Co. Litt 24.

7. Drunkenness* wh operating as a temporary Insanity, is not of itself, in Law or Equity a ground on wh one can avoid his contract. — For tis his own fault. The Rule is founded in Policy. 2. P. Wms 131. 1 Ves. 19.

Contra. Rule 1. 2. * voluntary drunkenness 1. Ath. 552. 2. Ves 452. 1 Pow 29.30.

But if one drains another into a Fuddle & deceives him and then obtains a contract from him, a Ct of Ch will set it aside. Pow Ca. 3 P. Wms 131. For here contract was obtained by fraud.

A Person's being of a weak intellect, is not per se a satis reason for avoiding his contracts. For y Law don't distinguish between subordinate degrees of Wisdom & weakness in y minds of men. but y only distinction* the recognizes is between minds, Sane and Non Sane. and y same rule holds in Ch. Pow. Ey. 31. 1 P. Wms 130. 1. Atk. 56. 63.65. * unless (ut Pub.) in case of Idiocy, Lunacy &c.

Secus in Equity if any fraud or imposition is practised upon a person, this circumstance, and if when such person is a party, there are such circumstances warranting a suspicion of Fraud, Ch will generally relieve on y ground of Fraud. 3 P. Wms 129. 2 Pow 228. 1. Dr 31.

8. Infants.* upon y same general principle, viz want of intellect or capacity of assent, wh in some cases for necessaries, &c are regularly not binding. And y Exception is founded in necessity only, and ant admitted in any other principle. Pow. 39. 2 Ed. 59. 32. 29. For Infants in Judgmt Law have no discretion &c. no mental power to contract. For Distinctions see Part Chitty.

By Civil Law. full age was 25. by E Law. 21.

The contracts of a Feme Covert are also regularly void for want of a moral capacity in her to assent, — her will being subject in presumption of Law to her husband — hence in general her contracts bind neither him nor her. 1. Pow. 82. 112.

But there are also other grounds on wh her disability rests, viz want of property or control over it, and of husband's rights. 1. Pow 93. For of distinctions, see Ves and Wife.

Who may by their agent in their contracts, bind others as well as themselves?

If a Tenant in tail agrees to alien lands, he is bound by of contract, and to of disherison of of Issue in Tail. and Chy will order him to levy a Fine and recovery according to of Contract. For of Forfeitures is in his power and Estates Tail arit favoured.

1. Chy Ca. 171. 2. Pow. 112.

The Cestui que Trust may by an agreement to wh of trustees arit parties, bind their interest as well as his own. of Trustees may be compelled in Chy, to join in executing of agreement. 1. Pow. 12. B. 1. Ch. Ca 173. 208. For of beneficial interest is in of former. of Trustee being mere depositaries of of Legal Title. for his use. A estate to A. in Trust for B. B may dispose of it to C. and compel A to (ut Sup)

A Trustee may also bind of Estates of of "Cestui que Trust"
1. Pow 113. 1. Ch. R. 131. 1. Ch R 25. 7. Jo. 34. 663. 8. Ch R 516. 1. Ch Ca 334. 44. Pow. M. 205. A Estate in Trust to A. for B. and of Trust not appearing on of face of it C. & D. purchases for a valuable consideration. For a bona Fide purchaser of of Legal Legal Title arit to be affected by a right of of existence of wh. he had no notice. He has equal Equity and also of Title at Law.

If an ancestor entitled to the [illegible] agreement to alienate his lands, bind his heir, the [illegible] consideration of the [illegible] and the latter [illegible] the [illegible] may be compelled to convey [illegible] purchase money made to [illegible] representatives of purchaser.

2 Bern 213. 1. Pow 115. 4 Brown P Co. 435. 1. Pow 116.

[illegible] time of the contract, the estate was under [illegible] the hands of the ancestor. The heir then has no [illegible] to it. The purchaser's claim is therefore [illegible] and the latter [illegible] Inc.

10. And an agreement to convey an inheritance made by a Tenant for life, may be enforced in Eq. against the [illegible] agreement at the time of making was clearly advantageous to the latter.

A mother acting as adm.tx to her husband, may under special circumstances, bind the minor children in Equity. 1. Pow 123. 1. Bern 210. The Chancellor in such cases exercises a discretionary power, as being derived from the King, the permanent guardian of Children, or rather Infants.

So the contracts of a woman before marriage will in general bind the husband, when she afterwards marries. For her liability is suspended in favour of the husband.

For as he takes the benefit of the wife's [illegible] the contract and as the marriage suspends her original sole liability, he ought to assume her responsibility. He takes her "cum onere" ante 8. 2. Bern 448. 1. Rol 351. 10. Mod 180. 6. 243.

1. Pow 123.

At Law, the Real Estate of a Feme Covert, cannot be alienated by Fine or common recovery, but the agreement of the husband to convey her Real Estate, if converted to by her on her private examination, may be enforced in Eq. but an agreement by the husband alone cannot be. 1. Pow 124. Husb. Wife and S.

1 If Tenant in Tail grants a Conveyance of inheritance and dies before Conveyance, the Issue in Tail cannot be compelled to execute the agreement. tho' the Tenant might have decreed, the Plaintiff. yet he having not done it, his agreement to do it. cannot deprive him of their legal right.

2 Bro. 634 1 Pow. 135. * 2 Rent 350. Robert 263. 1. Lev 238. Roe. Chy 278.

Tenant of the receive, but because money he is then bound the next rule.? 1 Pow 126. Chy 171.

But the rule is otherwise if the law varies the condition, for as the ancestor agreed to convey. The former by the act, accepts and takes benefit of the agreement. and is therefore bound in Conscience to Execute it on his part. 1. Pow. 125. Chy Ca. 171.

† 4 Ow & Ty 5.

If a Tenant in Tail having power to make leases or Estates, covenants to do so and dies before Ed. Equity, it is said, will carry it into Ex., and so by heir. Pow. 128. 10. mod 405.

† 4 Ow & Ty 5.

And an agreement by tenant in Tail, to dispose of the lasting improvements or lasting profits of the Estate cannot be enforced as against Issue after his death, tho' it might have been enforced as against himself. So agreement to sell timber trees.

11 Co 50. Rosh. 194 1 Pow. 122. 127.

Ex.rs and adm.rs are involved in remedy and are bound by his contract, * without being named therein. If. * property in his hands is leave, but the Ex.r or adm.r ain't personally liable. So if he makes an obligation, and die before performance.

2. P Wms 187. 1 Pow. 128.

12. An Agent or Atty being duly authorized, may by agreement in the principal's name, will bind his principal & will not be himself bound. See Master and Servant Head 37" 5 Brown Ch Ca. 547.

3 P Wms 277. 2 Eq. Ca 31.

But if an atty makes an bargain for his client, a contract, wh he ain't authorized to do, the Atty will be

Counsel. sent his Client with note. "Master Servant 50"

Does an y contract be enforced as him only in Equity? For if y other party shd sue y ally upon it at Law, there would be a variance. But might he not be subpoed at Law. as for fraud or in Trover, as y case might be upon an agreament implied?

If a Tt Tenant agrees to clean his Port, and die before y agreament is executed, y Survivor it has been held, cannot be compelled to return. Tt. Claim to y Price, being as to y party claiming under y agreament to sell.

2 Vern 48. 63. 1. Pow. 129. 1 Newland 35.

Tenor of y agreament amounts to a Sevrance of y Tenure in Equity. Tt y Tin accessorii is then destroyed, and y Survivor becomes trustee to y Purchaser, or his heir.

2 Ves. 634. Co Litt 53. B. Amb. 277. Newland 35.

First y agreament always amount to a sevrance in Equity, if it be such as being made by a Tenant in Severalty, would be enforced in Eq.? to y Land rotation with qualification by analogy to y case in the Exr. 2,/. see Newland 35.

But if so y first rule cannot operate in any case. it is equity. but is abrogated. But it not so in Law. Does Lunt. y section in first land down. would seem to require a change of p. 2 under y contract. before y death of y deceased Tenant.

How assent may be given to contracts & agreements? 13.

Assent to a contract, may be either Express or Tacit 1. Pow 131.
Express assent is declared by some sign, intended to signify it, as by speaking. writing, Gesture it and may be either precedent, Concomitant or subsequent, so

y principal act. Pow. 12. 1. First, A master sends his servant to buy goods on credit. 2. Buys them himself and promises to pay for y m. S. The servant buys y goods on his Master's credit without any previous authority and y master ratifies it by taking to his own use, y things purchased.

Tacit or Implied may arise in several ways, as y silence or inaction. If a man will be present where y mor. is contracting with another, to make a second mortgage of y same subject, and knowing y contract, is voluntarily silent. In y s case, he loses his priority on y ground of an Implied assent, to his mortgage should be postponed. "Mortgages" 55.

2 Vern 151.
1. P. Wms 393.
1. Vern 370.
Pow. 125
1 Ves. 6.

1. Bro. Ch. 357. 1. Pow 132. 5.

Note. y first mortgagee may be in such cases postponed on y ground of fraud. But it seems not necessary to consider his act as fraudulent. It may be a perfectly innocent and implied assent.

14. So if a lessee being present, when y lessor makes another lease of y same lands, to a stranger and knowing y contract, makes no mention of his own lease. y second lessee being ignorant of y first, will even at Law be preferred.

2. Vern 158.
239.
1. Eq. Ca 355.
Pow M 183. 5.

And Eq. will enforce such implied assent even as in Infant. For, otherwise, he, y Infant might be guilty of a fraud. As where an Infant Mee is present at a contract for a second mortgage on y same property, and is voluntarily silent: he, by his silence, forfeits his right of Priority. 1. Pow. 34. Burn. 102. 3. Bamad. 102. 3.

1. Pow. 134.
Pow M. 80.

And it has been held, yt y first mee being present as a witness to y second deed of Mortgage, is sufficient of his knowing y contents, in he proves y contrary.

But yo rule is denied by Sir Hardwicke and Thurlow, 1. Ves. 6. 1. Pow. Ty 35. on y ground yt it wou be dangerous, as giving opportunities for fraud and collusion

5. But in order to raise such an assent on y part of y person to be affected with it, or by it, tis necessary not only yt he should know yt his own claim interfers with y subsequent contract, but yt his silence shd be voluntary. If coerced or awed into silence his interest cant affected by it. 1. Pow. 34. Assent, either express or implied must always be voluntary.

Upon y same general principle if y holder of a note, wh has been dishonoured, omits to give reasonable notice of it to y Indorser, he is considered as agreeing to discharge y Indorser, and trusty solely on y maker for payment.

Where what need is there, of imputing such assent in y 1st case? The holder loses his claim upon y Indorser by his own neglect.

And in General, y Law will raise a Tacit agreement whenever tis necessary for giving effect to some principal express contract. As if one makes a Sale of trees growing on his Lands, he tacitly agrees yt y vendee shall have free ingress and egress to take em of from y Land. So when one lets a chamber, he tacitly contracts yt he shall have free access to it.

Co Litt 56. 7 Rep 35. 1. Pow. 136.

And there is one species of Tacit agreement, universal to all Bargains. Tacit sign, viz, if either y Buyer or Seller can in law not be held by y express contract, reliance on y vendee is implied.

1. Pow 137. 2. Burr. 1011. 3 Rep. 166.

Is not yo winning so much? Is it not more to Pow's advantage by such a tacit agreement? Is never deny yt in reclaiming upon y Contract. The Law itself

If

[illegible] person, [illegible] arrangement [illegible] Months, yet Tacit agreement might in [illegible] be understood [illegible] Tacit agreement, as [illegible] original contract and so on "in infinitum".

10. Where one usually employed another, to contract for him on Trust, he tacitly assents to any particular contract of y same kind, if y latter makes in his name.
1. Pow. 138. Master and Servant - 45.

And in every case of Feoffment Release, Surrender, Gift &c, there is a tacit assent to y act on y part of y Feoffee,
2. Leon 233. 12. unless y contrary appears, he is presumed to assent
3 Co 26.7. to what is Prima Facie advantageous. 1. Pow 138.9.
Str 165. "Title by Deed". 47. as a Mortgage made to a Creditor
2. Root 26. in his absence. So an heirs acceptance of property descending
4 Day 395 to him. is presumed. 1. Pow 139.
1 Pow 138.9.

So if a Drawee refuses to accept a Bill according to its order, but pays for y honour of y Drawer, y law implies an agreement by y latter to pay y amount to y drawee. "Bro. DD" 52.

So if y husband turns away his wife, if act, tho data, amts to a tacit consent on his part to be bound by her contracts for necessaries. Hus. Wife. 21.

1 Pow 139.

Upon a sale of personal chattels, there is an implied
3 Mo 57 warranty of Title. 12. yt they are his property.
Co 632. Trespass on y Case. [illegible]
[illegible] 1. Smith. 109. 373.

What circumstances will invalidate assent with?

Ignorance Ignorance is no rule in some cases invalidate
Error. assent given to a contract, 12. ignorance of fact,
but not of law. y policy of y law forbids yt.
1. Pow 138.9.

If y mistake & error of ye party as to his own rights, is caused by y fraud of y other, y contract will vanish. in Equity. 1. Pow 142.

But to avoid on y ground of fraud: 1 P Wm 239. 1. Do. 19. 20 - + vern 534. 1. Do 15. 20. As y heir was induced to believe yt y ancestor's will wont only executed. when it was. & released his right for a small consideration, y release will be set aside in Equity. or Chy.

But if on a doubtful point of right, both parties being ignorant, on wh side it lies, a contract is made, y party y party really entitled, is a loser, still y contract will be good. As y Parties in y grounds of y right being doubtful and knowing yt one of ym must be loser, each voluntarily submits to y risk of losing. As. The compromise between litigant parties, wh is common -

Post 112. Pow Ch 37. 1. P Wm 726. 2. atks 587.

1 Pow 142. 2.

18. But if y party really entitled is ignorant of y extent of his right, "says Powel" he must y quantity or value of y subject contracted about, (IE. under a mistake as to matter of fact, & of means of informing himself, he seems not to be bound, as y case may be. As Case of a bequest of 10.000 Dolls. to a daughter, on condition yt she release her orphanage part wh amounts to 40.000 she accepted y former, & released y latter - The release was set aside in Equity. - Gould says y party was guilty of fraudulent concealment,

3 P Wm 316. Pow C 144.5. 2 Do 209.

In y case of Lansdown vs Lansdown, both parties being deceived, by y opinion of a 3d person, as to y right in Question, y contract was set aside in Equity. This was y case of y Schoolmaster. There was a dispute between 2. Brothers and y property in fact belonged to y elder brother. but y schoolmaster, to whom they refered it, decided it

relinquish to y younger. 2. Rev. 1. Moseley 264.
Not like y case of compromising a doubtful right,
where both parties agree on y ground of its being doubtful
& each of wh voluntarily submits to y risk of being
a loser. Here both are deceived, tho' no fraud is practised,
yet y deception operated as a fraud tho never intended as
such. 2. Vern 4 & 7.

But generally speaking ignorance of y Law is no ground
for avoiding a contract. 2 East 469. & Quere as to yo case.

Wagering contracts are generally binding upon y parties,
at C Law. 11. Co 87. 8th b. 1. Lev. 33. 5. Burn 2802. see Insurance 2
on "17." and it aint essential to y validity of such contract,
yt event upon wh a wager depends, be in itself contingent.
But this satisfies yt it is equally uncertain to both parties.
18. In yt case ignorance doesn't invalidate y assent.
No Question, in a ship at Sea, is valid cont?

There are some cases where y assent of an intended purchaser
of an estate, is invalidated in Equity, by erroneous representations
respecting y circumstances or quantity of y subject. tho'
there be no fraud in y case. If the distinction is yo
of y mistake respects y circumstance or quantity, wh seems
to have furnished y principal motive to y purchaser,
y purchaser aint bound. For y ground of his assent fails.
as a agreement to buy land for a Milseat and there appears
to be none. This contract will not be enforced in
Equity. for y ground of assent fails. Seems if not y "Sine
Qua non" y yo contract cannot be enforced in Equity.

1 Ves 400
2 Vern 185.
1 Ro 32.
1 Pow. 147.
149.
2 Ro 196.
201.

Seems if y mistake relate to a particular, wh appears
not to have been principally in y contemplation of y
purchaser, - he is bound by his assent, and his relief
lies in compensation for y difference of value. 1. Pow 148-9.
and Equity will enforce y contract. As a mistake

in y amt of rent given for land, wh is y subject of y contract. (Ye Pg. thinks, fairly wise enough leaving to y vendee and yo is what is meant)

1 Pow. 148-9.

But if on an agreement for a purchase, y purchaser makes it an express condition, yt y subject shall be possess certain qualities or incidents, y absence of yn wilbe generate void. and such a contract cannot be enforced vs him. 1 Pow. 150. As a condition yt a Farm has such a quantity of meadow. Pr wh it has not.

20. And in some cases, y intention of parties as to their assent, may be infered from circumstances, and y want of assent may be infered in y same way. As Sale of Female Slave in y dress of Male, yo contract is void. For there is fraud. 1 P & M'n 159.

According to Powell, if an unsound horse be sold to a man who he did not to warrant, is sound, want of assent may be infered and y contract is void. 1 Pow. 150. Sure void? See Ex. Ch. 115. Doug 22. 1 T. R. 133. 3 & 4 Ch. * it ant law and all y English auths are vs y Case. 2 East 314-22. Caveat Emptor. 1. Selw. NP. 687. Poa R 115-123. 2. East 314. 22.

According to decisions in yo Cts, there is an implied warranty y soundness. 2. East 314. 2. Ves. 122-150. Sure are those decisions now regarded as law. Cowp 1. 63. 1. Sel 687. 2. East 322. 14. 1. Pow. 147. 2 East 314. 3 T. R. 15. * Pg imagines yo, wh is precedent to point, now overruled.

Indeed yo appears doubtful, Powell is all y English authors. Caveat Emptor is y maxim in such case, not even damages are recoverable. if there is no fraud in y sale. In yo case y Contract is good.

Infancy of Contract.

Contract

Under yo head, we are to enquire as to what contract,

208.
1 Plow
152.

may be made, so as to bind y lessee, to pay. 1 Plow 152.

Wh y ye heard a distinction is to be observed between contracts executed and executory, merely executory. 2. Ro. 446.
Executed and executory contracts what? 1. Sow 224. 1 Sid.

21.
24.

Ad by y first. no person can by contract executed, convey any thing wi wh he hath an actual or potential interest at y time of y conveyance. For one cannot transfer to another, what dth not his own. As if a grants to B. all y wood wh he shall hereafter buy, ye contract is void. Plow. 432. Robert 132. Co Litt 309. B. 1 Sow 152.

So if a make a lease to B. of land of another, to debt for rent, y lessee may plead, yt y lessor hadn't any interest in y land at y time of lease made. or?
1. Sow 153. Co Litt 41. B. Cro 233. 308. 3 Lev 40. Do not ye words allowed on y covenant (express or implied) of good title is broken by want of title? and yt such covenant is a condition precedent? P R R. 357. Sta 817. 1. Sow. 160.
Plow. 432.

Where y lease were by indenture yr y lessee is then ousted. Cro D 233. 306. P 7. HR 537.

If one of 2. Ot Tenants conveys by deed, or by bargain & sale. y Ot property, and his Tenant afterwards die, wh before enrollment: Ho y moiety of y latter don't pass.

Where if y deed contains covenant, yt y Grantor is seised of y whole, wh would y other moiety pass by way of estoppel.

Upon y same general principle if a Feoffee to B. a house, with condition for payment v. mths hence. it can't all run to another before y expiration of y 6 months, for y property is changed, and y sale to another before y expiration of 6. mths. would not be made good by

passing to by at y time specified) C. at y time of y thing would not be in E. 1. Pow 154 d. Plow 413.
A. an alienee statim vel non.

Nor can one grant yt to wh he has only an inchoate title, to be perfected in future. As a Contingent Rem. 1. Pow. 135 Arg. 221. 4 M. R. 248. even ma' such contingent interests are recognisable, actually, and in ye only way possible. Fream. 441. States Rem. 23. 22. Sort. 23. "States in Rem. Rev." 1. Sh Bl 30. Dyer 221 1 Sm Ld 202. 3. 9. 3 J. Pl 88. 1 Sh Bl 224. 605.
As land is limited to A., remainder to B. when he shall attain 30 yrs. and B. survive y before attaining 30 y conveyance is void. Qu. It may be devised &c. &c.

But a thing of wh one is potentially y owner, i.e. a thing accessary to another, actually vested in him at y time of bargaining, may be disposed of by contract executed. As y profits of one lands for B. yrs to come. so also y future profits of any subject actually vested in y Bargainer at y time of contracting. 1 Pow 135. 7. Plow 132. Here y donee has a present interest in possession, tho not in lands, but he has in Profits.

Rights not vested actually or potentially, may be subject of executory contracts. These being no other yn the establishment precedent and Preparatory to y act fr wh y interest is to be conveyed. For tho' one cannot actually convey what he ain't got yet he may oblige himself to convey in future what he may acquire in future. as if covenants to purchase Blackacre. and convey it to B. if attained. B. to lease y land or wh he shall be seized on such a day. 1. Pow 158. 9. 60. 234.

In these cases. such agreement is good. as a sufficient act is to be done to execute y contract

Seems if no future act is to be done, to give effect to the Contract, as it must then take effect if at all, as a contract executed. Such cannot be by the preceding Rules. As a covenant to stand seized to the use of B. & his heirs and he shall hereafter purchase. This then operates as a Conveyance executed, and no future act is necessary.

23. But a contract executed may raise a future interest by way of Shifting?

It has been held in Ernst, that if one makes a deed, with Covenant, or Feoffm. of land, or not he is not the owner, & afterwards purchases the land, he is estopped from averring that he had no title at the time of the Grant. 2. Rol 295. Co Litt 265. 1. Root. 222.

Rule is the same in Eng as to Leases or Mortgages of Land 1 Salk 276. Pow. M. 285. 6. 2 Keb 364. 1 La Ray 729. 6 Mod 258. 2 Ld Ray 1048. 1550. Ek. D. 233. 306. 3 Tr. 370. 71. 2. Bem. 11. Pow M. 97. 1. Str. 760. 1. Pow. 160. Litt S. 4. 46." Title Deed. 6" Then may not a contingent remainder or executory devise be raised by such a deed, by way of Shifting. Estates in Remainder 2. ante 25. 21.

All contracts, must be first possible of performance. 2 Lawful in their nature. 3 Certain in its terms. 1. Pow 78.

Possible. 1. Possible. No right can be acquired or any obligation by a contract created to perform a ~~contract~~ thing naturally impossible. Such contract is idle and nugatory, since in the nature of 24. things it cannot be performed. 1. Pow. 78. 79. 80. For the old rule, "ad non cogit nemineni ad impossibilia" 1. Rol 420. 2 Litt 208. As a Covenant to enclose one of land covered by the Ocean. A promise to go from here to Rome in 3. days. or to confer a Monarch in a pending action when in fact there is no action pending.

Perkin Sec 7. 35.

These covenants are void, because they are morally impossible to be performed. 1 Vern 1. 2. Ca Lin. 203. Pentini. Keler, 150.

But y Law distinguishes between things in themselves impossible, and those wch tho possible in themselves, are impracticable as to y party ~~bound~~ contracting. If an agreement to perform y rules is vending. As to contract to sell an Estate wch belongs to B., in y case it is liable in damages to C. for non performance. Tho they wont decree a Specific Execution. 1. Ver. 512. 2 La Ray mo 1.50.

In y former case, it must be evident to all persons, at y time, yt performance is impossible. It cd not ever have been intention of either, yt it shd be performed. Seen in y latter case.

Therefore where one agreed to deliver to another 2. grains of Rye corn. on y following monday, and so on progressing and doubling y quantity on every successive monday, during y year. a performance was decreed cause y case was compromised. 6. Mod 305. 1. Bents. 269. 1. Ser. 111. 1. Wils. 235. 1. Keb. 569. La Ray 1164.
So of an agreement to pay for a horse a barly corn for y first nail, &c. Holden to pay y price of y horse.
1 G. says void because impossible.

Upon what principle is y se decision founded? For y Gen 25. rule is, if y thing stipulated for, is not deliverable, its value is y rule of damages. 2 Burr 1010. Str 400. 2 East 211. 1. Term R 424. 1. Ver 408. Dy 81. B. 125. 1. Vern 217. 1. Lutw 221. ~~aforesaid~~. Is not y Express contract treated as void on y ground of Fraud and y promisor subjected on an implied ~~promise~~, contract, to pay what he has received upon it? Pg thinks, y Express contract should be considered as Fraud. If he may be bound to pay y price of y horse on y implied contract?
A contract, ant void on y ground, yt its performance

is possible, nil this strictly v. Antea 24.

The distinction between a near and remote possibility of performance, arises in Executory Contract.
As a covenant by A yet if he die without Issue, his Land shall be settled on B., is binding and may be enforced specifically in Chy. Any condition, un probable or not, is by no means impossible. 1. Pow 163.4.

Also if one covenants expressly and absolutely to do a thing, not impossible in itself, his being prevented from performing it by inevitable accident, doth not discharge him. As a covenant to be at such a port at such a time with a Ship to take in Cargo. in y Defdt Thos prevented by tempest. He from performing y Covenant y Covenantee will be liable. 3 Burr 1633. 1. Doub. 365. Doug 309. see "action Covenant Broken" It would be otherwise, I conjecture if y covenant to perform y covenant within y time mentioned, within which, such a voyage could not possibly be performed ante 24. In such a case, he is virtually an Insurer as y risk of Failure.

Secondly Contracts must be Lawful.

Things stipulated to be done must be morally possible & lawful, or y contract is void. Nor none can be bound to do an act which y law prohibits. In Eng. a contract is unlawful, where agreement is to do something "Malum in Se" or "Malum Prohibitum" 1. Phillips 189.

The first kind are all contracts wh have for their object, something forbidden by y Law of nature — as a contract to commit murder. Shep Ch. 1. Pow 165.5. When a contract to give it a certain sum, if he will murder or kill J.S. - is void. Nor to hold such contracts

[illegible] B [illegible] to [illegible] crimes.

1. Hawkins 183. 1. Sonth. 213. Cow 39.

Second. Contracts are vs Law when they have for their object, something wh tho' not vs the Law of nature or the divine Law, is contrary to the Law of the Land or the municipal Law. 1. Pow 165. Co Litt 206.

Contracts may be contrary to the Law of the Land, as being repugnant. First to the public welfare. 2. as being vs some maxim or principle of the C. Law. 3. as being opposed to some positive St. Coup. 39. 1. Ken Rep 322.7.
1. Bos Pul 272. 8. TR. 89. 7. Do. 543. 3 Do. 17. 223. 2. Mils 341.
Hence all contracts, the object of wh is a general restraint of 2/.
12. upon a person trading in a particular way, are vs Law as being opposed to the welfare of the State. and ergo are void. 1 Rob. 211. Ray 292. Cro Eliz 872. 1. Selwin 303.
1. Pow. 166.7.

So all contracts, in general wh militate vs sound policy, are void. National policy is the policy of the Land of the Law. 8 TR 89. 7 Do. 543. Coup. 39. 1. Ken Rep 322.

And the rule is the same as to contract, whose object is a general restriction upon the exercise of a trade, even for a limited period. — [illegible]
1. Pow. 167. Cro J. 596. Co Litt 206. 1. P Wm 180.1. 11. Co 53. B.
So if a Farmer agrees not to cultivate the land, the contract is void.

But an agreement not to exercise a trade in a particular place, may be binding, for such contract may be temperate. Cro J 596.
It may be overdone, in a certain place. If the trade but it may be void hata to circumstances, 2 Bibob 136. Palm 172.

But a contract of the latter kind not totally, nil founded on sufficient consideration on upon the point, it seems the "onus probandi" lies upon the party claiming under the contract. The presumption is vs the existence of sufficient consideration. * even in a deed where the consid^n is generally presumed.

This presumption arises from the policy wh is the Law

Salm 172. [illegible] such contracts. Str 739. 1. P. Wms 181. 192. 11 Mod 27. 85. 130.
& this is y reason of contracts generally at ye Law. if there is a legal consideration, it is presumed to be satis.

28. And it seems immaterial any trade wh one agrees not to prosecute. is his trade y profession or not. If it is not, still y validity of y contract depends upon y foregoing distinctions. For no man ought to preclude himself from engaging in any useful trade whatever.
1. Roll 189. 1. P. Wms 132. and ergo y policy of y Law is opposed to y contract. [illegible]

Upon y same general principle, a bond for unlawful maintenance is void. for it is no public welfare.
1. Roll 172. Carth 229. 2. Saut 212. 4 Bl. 135. By maintenance is meant y upholding of another's lawsuit.
IE. Banatry.
A contract made with an alien Enemy, is also regularly void. as being vs y public welfare, because communicating with a public enemy, may endanger y public safety.
8. TR 648. 1. Bro. 85. 2. Rolle 173. Rolle. 173.
[illegible] 15 Johns
So an insurance upon y property of an alien Enemy is void. It promotes y commerce of y enemy and gives our citizens an interest in yt commerce.

8. TR 548. 6 Bro 35. Doug. 238. 1. East 96. 475. 1. Bos. 345.
Mansfield and Ashurst were contra, tho' they said y advantages were equal to y disadvantages) But y rule yt y contracts with an Enemy are void, is not universal. Ransom Contracts with an Enemy are binding IE. a contract by wh y captured party on condition of being discharged, agrees to pay y Captor a certain sum. as a ransom. but they can only be entered into by admiralty.
Pleas "36" Insurance. 3. 4. 3. 93.

Tho y master of a ship may by such contract bind y owners as well as himself. This is a rule by y Law of nations. Doug. 619. 3 Burr 1734. 1. Bl. R 363. But [illegible]

y action will not lie to recover y ransom money till
bruce be released. 6 T.R. 23. Marsh. In. 3d.
The rule is y same in y hostage case. y capt. are
absolutely taken with y hostage, y latter being only a
pledge, y only bound independent of y hostage.
"Pno. 304. 94."

And as to concerning such contracts in general made
with an enemy, as arise out of y state of hostility, and
tend to mitigate y horrors of War, are binding.
Doug. 625.5. as Treaties of peace between belligerent
States. truces. capitulations. and between military com-
manders agreements for exchange of prisoners.

In Eng. however, ransom contracts are now prohibited
by y St 22. Geo 3d. Marsh. 432. Quere as to y Ill Stats.
a bill was introduced in Congress, but was but
an it passed. P.(S.C.) don't know.

Marriage brokage bonds are void. IE. bonds given for
assistance in promoting marriages, because they are
procuring
of dangerous consequence and militate no public
policy. 1. Burr 474.5. 1 Sonbl. 245. 1. Pow 174. 190.
Esb D. 184. 3 Lever. 411.
The same principles apply to promises and agreements
of y same kind.

2d Contracts opposed to any principle or maxim of
y law are void. Pow 110. Hence if a consideration, wh
is a cause of a promise or y promise itself is opposed
to any such maxim or principle, y contract is
unlawful and void. 3 Salk 97. 1. Buls. 38. 1. Pow. 170.

Thus a promise in consid.n yt y promisee would
fraudulently discharge a debt due to his master, was
holden void. 1. Pow 170. 3 Salk 97. For y consid.n is
opposed to principles of Law. ergo y whole contract
is void. "Post 37."

31. If a Pltff for a valuable consid^n, promise not to prosecute an Escape – tis void – as tis also a promise & obligation to indemnify him for it. Where y promise, or y thing promised is contrary to public good – Post 39. 35.
10. Co 76.
112.
Cro Eliz
199.
1. Pow. 176.

So a promise by a Minister of Justice, to do an unlawful act in his office. is void. For y thing promised is unlawful. or a promise by another to indemnify him for it: as then y consid^n is unlawful Cro Eliz 230. 1. Pow. 176.

But where y unlawfulness of y consid^n or rather y fact wh makes it unlawful. – is unknown to y promisee a contract of indemnity founded on it, may be binding. As if a bring^g P to an Inn under pretence of having lawfully arrested him: and promise to indemnify y host for keeping him as a prisoner. If y host is sued, A will be liable over to him on his promise. "action on y Case 17" Hutton 53. 1. Pow. 178.7.

This is an Exception to y Gen Rule, as between Tortfeasors, For y host is innocent of any crime. and his motive being innocent, of course no illegality in y consid^n can be imputed to him.

So if a Pltff on a Fi Fac. request y Shff to take certain goods. as y Deff wh y are not his. and promises to indemnify him. y promise is good and binding on y Promisor & for y same reason – "Tresp. Case 17" "Gittle by Execution" 10. Cro J. 752. 1. Pow. 178.

All contracts, y objects of wh mitigate vs y Laws of Morality and decency are void. as being illegal. As a Wager as to y Sex of Chevalier D'Eon 1 Pow 133. 183. 233. 1. Cow 30. 729. 35. 2 TR 616. 3 do 698. Post. 35. 7. 8."
1 Pow
183.
233.

So of contracts made to corrupt suppose. as a bet with one having a state or influence in appointments, yet it shall not be appointed to such in place. Marshal ins. 96. 1 Pow 182. Cowp 39. 3 T R 410.

So of a wager yet is but a cover for deceit. 1 Pow 184. As bet on a loan by y Lender yt borrower shall repay it in such a time. 1 T R 56. 1 Pow 184.

So a wager lie to y made of or playing an illegal game. 2 Str 43. It promotes a knowledge of y game.

But a wager between Pltf and Def is a case wh to y ultimate decision of it, is good at C Law. 1 Pow 184. Comp 37. For yt does not crude their interest in y issue of y cause, nor does it tend to influence y decision. 1 Pow 184.

And wager in General are tending at C Law 1 Pow 140. ante 18. But y rule has been much disapproved of. Marr. Ch. Ca. 2 T R 410 5 Ed 693.

But in Court all wagers are made illegal by 8 G. C. 361.

So of money knowing lent at y time and place of Gaming, and to a party gaming. X

Does y St extend to any case of money lent to a party wagering except yt of a Wager upon some game - horseracing or other sport, or pastime? Seems not St Post 37.

34. Contracts in fraud of third persons are illegal & void. As an agreement between cutters and another to cheat y government in y purchase of subsidies for an Army. Doug 433. 450. 1 Salk 156. 4 T R 166. 2 Ed. 763. 1. Bos. Pull. 95. 285. Cowp. Dig. 184. 1. Atk 322. 656. 1 Pow. 185. 2. Ed. 165. 176.

"Pow Chy 40" 1 Ves 1 Ves 8 y 7.

So of a secret agreement of one of y parties to a marriage to withdraw part of his marriage portion. This a fraud on to y other party of y marriage. Str 240. Cowp. 184.

Cowp. 184 1 Pow 185.

So of an agreement to bay for attendance at an auction to enhance y price of goods by influencing bidders. 1. Powell 35. 180.

Contracts are unlawful and void, when y omission of ~~sum~~ some legal duty is their object. 1. Pen 235. As contract by an undersheriff not to serve execn above a certain amt. or not to execute process on a certain part of y Bailwick. Post 35. 47.

Hob. 12. More 856. 1. Pow 195. 6.

1 Pow. 188. 189.

So of contracts wh tend to encourage unlawful acts or omissions of any kind. As a bond to indemnify y printer vs any any indictmt or action for Libels. 1. Pow 196. An obligation given for compounding a felony. is illegal. 2 Bls R. 643. 1 Pow 196

So of a contract to indemnify a Shff for embezzling a Writ or promoting an Escape. 1. Lev. 209. 13 Co 100. B

Cro Ch 350. 3. 4. Plow. 60. 64 1. Pow 197. 8.

To save one harmless if he will committ a felony Trespass or other wrong. This a temptation to y commission of an unlawful act.

So of a wager between 2. pt one of ym or a 3 person shall do any criminal act. ante 33. 1 Pow. 198. 9. This an incitement to Immorality. Post 45.

3d Contracts prohibited by St Law. are void 1. Bl 11m 186. 100. 6 T R. 498. 99. Mark. Pr 96. As a contract for more an legal interest is void by St. 1 Pow. 188. 189. 166.

So of a secret agreement of a bankrupt or by any person on his behalf to pay money to a Cred. for signing his certificate. This void by St. George 2d. 1. Pow. 189. [illegible]

And would have been so at C. Law, (Semble) as fraudulent on y other Creditors. 1. Pow. 150. 1.
The money ought to go to y payment of all y Creditors if to any of them. So holden in Court in case of a compromise between an insolvent & his Creditors, upon a bill in Equity by y Creditors to be relieved against such a contract.

Distinction between cases of covenants & bonds for y performance of covenants, & when some of them only are lawful, & some are made void by St & cases where some are lawful and some void at C. Law.

36. In y former case y whole bond or other instrument is void: In y latter the good as to y Covenants, yt in themselves are lawful & void as to y Covenants yt are in themselves unlawful. Ante 35. 1 Pow 199. 2. Wils 351. 1. Vent 237.

Thus if an underSh covenants not to serve Executing above a certain amount so also to save y Sh harmless, of all weakes or persons, arrested by himself, y contract as to y former covenant is void & as to y latter good.

The illegality of y former covenant is created by y C. Law. 1. Pow. 195. 200. 2. Wils 357. But if a Sh takes a penal bond by St, 23. Eliz c. for ease and favour of D for a debt due y whole bond is ~~void~~ void.
See Shff 30. 1. Vent 237. 2. Wils 351. + Bac 438. 9. Shff 1. Pow 200.

This difference arises, as I conceive, not from any difference in principle between y effect of a particular illegality, created by St in one instance & by y C. Law in y other, but from y knowledge and structure of y St. Law. wh in such cases declares y bond or security void &c. Instead of y construction given to y words of y whole bond or security. If a St shd merely declare a particular clause, or condition in an obligation to be void, y whole obligation would be so.

But tho an illegal contract creates no right wh can be enforced, yet after it has been executed, y Law in some instances suffers it to prevail, by refusing to aid either party in rescinding it. 1 Pow 200.

First. When y illegality is of such a kind yt both parties are deemed criminal: here if y contract is executed on y other side. 2E. if y unlawful act is done, he who has paid, cannot recover back, what he has paid.

3d. In Pari delicto potior est conditio defendentis
Doug 461. n 468. Bull NP 131.2. 1. Salk 22.2. Burr 1012. Cowper 790. 8. TR. 578. 1. Bos Pul 9. 298.

Seem while y contract remains executory, as to y act stipulated 1E. while y criminal act remains unperformed. There y other party may recover back y money, wh. he has paid. 1 Pow. 202. 6. 7. Bull 132. Doug 47. Post 38. 47.
As money paid to A to hire him to beat B. if y beating ant committed. y money may be recovered back. Seem if it is committed.

*. Quere as to y correctness of y distinction in point of principle? Wd it not be better to allow a recovery in both cases, or in neither. ? 7. TR 535. "Post 47."

Since decided yt money is deposited on an illegal wager, and paid over with Lord's consent, it ant recoverable.

March 8. n 552.3. 1 Bos Pul 3. 298. Even here y wager is decided by event.

"Assumpsit" "13."

8 TR 575 Doug 696 But if money then deposited has ant been paid over, either party, it has been holden, may recover from y Stakeholder, y part deposited in his hands, tho y wager is decided. As on a horse match. For y loser ant paid y Winner has no legal claim to recover it, tho' an illegal act is committed. For y Law wont aid in enforcing y Contract. as it would not in rescinding it if y money has been paid over.

Suppose y Stakeholder pays y whole to winner after being prohibited, is he (Stakeholder) then liable? It ant yt y same as y last point in principle?

Seems in principle yt he is. For as it seems to me, y winner could not in such case to recover it of y Stakeholder. y latter cd not retain it vs y loser. Marsh Jn. 43. 3 East 222. Park 8.

Sed vide Esp Dig. 25. Contra by Hofman Recover. Y weight seems to be vs y right of recovery. on y ground yt when y contract is executed, y party paying cannot recover it back.

Under our St y Loser may recover back in all cases. St Comt 311. ante 33.

35. And it has been once decided, yt money paid to one of y Parties, before hand on an illegal wager, was recoverable back after y Event. i.e. to F.J. and thi y Event was in favour of y Def. y Winner. It questioned 1 East 96. 8 T.R. 57. 4 John. 426.

Indeed y case is opposed to y current of authority in 8 T.R. tis said yt y action was vs y Stakeholder before payment over. Esp. 55.

Money advanced for y procurement of an office is recoverable. before y office is procured. — Not post.

So of a premium paid on an illegal policy, before and after y risk is over. or run. 1. Pow. 202.6.7. Doug 471. But yt distinction as before observed, seems to me opposed to y policy of y Law.

Quere. when y party who has paid money on an illegal contract, ant "particeps criminis" he may recover back, thi y contract is executed. 1. Pow 201.2. Esp 13.

This is y case where y Law prohibits y

y contract for y protection of y bankrupt, saying, it was made of money, paid. Cro. Jac. Bourg. 434. 671. 1.

Contra 1. Salk 22.

Str. 915. 4 TR. 561. Bul. NP 132. 1. Ken. BC 65.

1. Ton Ml. 218. 35. 1. Roll. 202. 5. 2 Ro. 1. 2 Ro. 1. 2 Ro. 8.

y money paid by a bankrupt, with 34. or his friend to a creditor for signing his certificate.

2. Roll. 205.

23. A security given or promise made in consequence of a transaction prohibited by positive law, and however of course void. As if one of 2. in an illegal transaction pay y whole losses, & taken a security from y other, for repayment of his part, is good. For y contract is done & is removed from y illegal transaction, — that is, past. The payment of y losses wrt unlawful. and neither is y promise of repayment unlawful, nor does it tend to any thing yet is so. and y payment as to half is virtually a Loan. Watts 180.

3 TR 418. 2 H Bl 379. 2. Bur. 2068 3 TR 422 6. 2 Bl. 405. 2. Bos. Pull 372. 3 7 TR 630.

So it has been holden, if it has been paid with y privity & consent of y other party, tho' no security is given or promise made. 3 TR 418.

Here yo rule has been much shaken and virtually overruled. It appears on principle not to be Law. There was no obligation on either party to pay y Loss. Loss. 2. Boss. 372.3. 2 H Bl 379. 6 TR 61. 405. 7 TR 630.

If paid with his consent & privity, there can clearly be no recovery had. 2. H Bl. 379. here there is no new "Res Gesta" no special instance from wh to imply a promise. Park 8. Park In. 8. Marsh. 42.14.

If money is deposited with a 3d person, to be paid over. y party for whom it was deposited, cannot recover it from y Depositary. "Ib. 14."

If a person makes a contract, y making of wh is made criminal in him by positive Law, he may

be bound by it (semble) ~~by positive law~~ tho' he cd not claim under it. as by St 21. Hen 8th It is an offence for a clergyman to trade. But if he did trade, he wd be bound by his contracts as a Trader. 1. Atk 196. 99. Ch. Bile, 19.
For y nature of y contract ant unlawful, his making only - is so. - he only is y offending party. And y object of y law is merely to subject him to a restraint, not grant him an immunity. He cannot take advantage of his own offence, or y law wh he has violated. 40.

So if one trade in smuggling only, he is liable as a trader. to y bankrupt laws. 1 Atk 339.
He can claim no benefit from such contract.

If y object of a contract is perfectly useless unless it is void, "cui bono" no valuable end to be obtained. If no advantage to y party claiming. As agreement not to wash one's hand. 1. Pow. 231. 2. Wd not ys be vs decency and morality and be void on yt ground? not to smile - not to follow a fashion in dress. "Lex non cygit cogit ad vana" "ne impossibilia"

A contract yt wantonly affects y rest & peace of 3d persons. is void. A wager yt a has committed a crime. or as to y sex or any bodily defect of a 3 person. Cowp. 729. 735. 3 TR. 699. 3 TR 700 ante 33.
— ⟨. or ⟨ 1 ⟨ ⟨ ⟨ ⟨ ⟨ ⟨ 3 TR 700. 1. Pow. 232. 3.

3 Certain

Hence if a promise to deliver goods in consideration of B's promise to deliver goods in a short time. A's promise is said to be void, because B's promise wh is y consideration of it, is uncertain and void.
Cro J. 250. 1 Buls. 92. 97 1. Pow. 180.

23
But a promise to pay money without ascertaining any

any time of payment is good. It is payable statim 1 Pow 1180. for it creates a present debt and no future de time is appointed for payment.

2 Ill 124. 427.

Tho if one promise to do a collateral act (more properly a specific) and no time is appointed, tis said he has his whole life time. it is said to perform it in. As to make a lease. To deliver goods. 1. Pow. 180. Quere wont it now be considered as requiring performance in a reasonable time. or on request?

"But id certum est, quod reddi potest certum."

Hence if I promise to pay to a, whatever he pays for me, tis satis certain. For what he advances for me, may be ascertained. Popham. 148. 1. Keb 55. 65.

Bro Ch. 194. 1. Selwin 270. 1. Pow 180.

41. Of the Nature and Kinds of Contracts.

All contracts are Executory or Executed. 1. Pow 234. 2. Bl 443.

A Contract is said to be executed, when y parties transfer property to each other, together with immediate possession or with a present indefeasible right of future possession. As goods sold, paid for, and delivered. Exchange of horses.

2. Bl 443. 1. Pow 188. 9. 175. 234.

2. One having land under lease, sells it to me in possession, when y lease determines and receives y price, Here y whole agreement is Executed on both sides.

Executory. are those where no property passes at y time, or "in presenti" but wh are introductory or preparatory to an actual future transfer, or Exchange of property. As agreement to Exchange horses next week. — an agreement to sell. grant. pay &c "in future"

"Ibid"

A contract then is Executory where one performs immediately and y other is trusted. (It wd it be not more proper to say, yt in y former case, tis Executory on one side and in y latter in both.) As. 1. a Loan of money on promise of repayment. 2. an agreamt to make a lease in consideration of an agreamt to pay for it. 1. Pow 234.

All contracts according to Powel. are Express. Constructive and Implicative. 1. Pow 236. The usual distribution is into Express. or Implied. and P.G. prefers yo latter.

42. First an Express contract is one in wh y parties stipulate in Express terms, what is to be done or omitted. 1. Pow 236.

Second Constructive contracts are such as are raised by construction out of Instruments. or Express agreaments. & are different from what y instrument "prima facie" imports. E they vary from y framed terms of y Instrumt. or Express agreamt. from wh they are raised. This however is but a branch of Express contract being raised by construction from y words used. Cro. E. 137 608. Yelverton 132. 1. Dev. Lev 24.

Thus a recital in a deed of conveyance respecting y Grantor's Estate. in y subject amts in construction of Law. to a covenant or agreamt yt he has a title according to y Recital. As whereas. B is possess^d of Black Acre for yrs. &c he assigns. 1 Pow 237. 1 Leon 123. Raymo 14.

So a recital in a marriage settlemt agreamt yt whereas A is to pay B. 1000£ for y marriage portion. &c was holden to be a covenant for y paymt of yt sum. 1. Lev. 122. 2. Eqty Ca. 652. 1. Pow 238.

So an exception in a deed Indented, may amt

to a Covenant. As Lease by Indenture of a farm excepting a particular close.
This is said to be a Covenant by Lessee. yt y close shall not pass by y devise.
What need is there of calling it a Covenant? If not, excepted. If not a covenant, y part excepted wd not pass. It seems to be only matter of description. Cro Eliz 657. Carth 232.
Salk 196.
11. Mod 170. 11. Co. 50. B. 1. Pow 238. 9.

43. But tis now holden not to amt to a covenant yt Lessee shall not disturb Lessor's possess. of it. Ibid. For Lessee is a stranger to y part Excepted.

But where y Exception is of some thing arising out of y thing devised, it amts to a Covenant yt Lessee shall disturb Lessor. ✠ Quere wn it be an Indenture. Pow 238.
But Quere an an Indenture is necessary. 1 Leon 324. 1. Pow 241. 2. As Lease of land excepting a right of way over it. Lease of a house excepting a ring wt to pass thro' it. For here y Lessee has an interest in y subject out of wh y right excepted arises and therefore is considered as y right.

So of a reservation of rent in a lease amts to covenant on y part of y Lessee to pay it. "As yielding and paying rent," of 100. Sole.
1. Role 818. Cro Eliz 657. Sty 407. 1 Vent 10. Cro J. 339. 99 Popk. 136. 7.
Hob. 132. 1. Leon. 246. 1 Pow. 243. 4.
So a lease without undertakings for trees amts or rather gives Lessee y trees growing on y land demised.
Now J. (JG) regard as express Contracts. all y Proceeding.

So if an obligation is endorsed. yt ye obligee wills yt ye obligation in a certain event shall be void, tis a good condition tho' ye words are ye obligee's, for such appear to be ye intention of ye party.

16. Implied.

Implicative Contracts are those wch are neither expressed in terms nor raised by construction from ye terms used in Express contracts. But wch arise from operation of Laws. out of ye nature of ye case.

As Labour done. or goods sold without any express promise for payment. A contract to pay is implied. 1. Pow 245. See "assumpsit" So one takes without authority ye profits of an Infant's lands. There is an implied promise to account for ym. 1. Pow. 244.6. 245.0. Parent Child. 145.0.

So if one delivers his goods into ye custody of another, latter impliedly engages to take such care of ym as ye case requires.

So if a Shff take money on exon. ye law raises a promise, yt he will pay ye money to ye Shff. in ye Exch. 1. Pow 255.0. ye numerous cases of actions called "indebitatus assumpsit" is founded on promises implied by law.

If A. grants his mes to B. he impliedly grants also a right to come on ye land to cut and remove ym. If he grants to B. land surrounded by his own. he impliedly grants a right of way to it. 1 Pow 256.7. 4 Rowd. 15. 1 Saunt 322. 1. Saunders 322. 2 Finch Law 63. 2. Bla 36. Tho' ye grant could not be expressly.

If lessee holds over without opposition from Lessor. 45. ye former by implication of Law. is considered as tenant from year to year. Pow 135. 258. There is "tacit agreement to renew ye Lease in yd manner. ye 2 (95) — ye 61 16 and 17

In Equity also. Contracts are sometimes Implied. As if purchaser of land having paid only part of ye purchase money, becomes bankrupt. The land stands charged with ye residue. Purchaser is by an Implied agreement a trustee to yt amt.

1. Br Chy 423. 4. 3 Atk 212. 1. Pow. 257. 8.

Where if Security is taken for ye purchase money?

Contracts are absolute or conditional.

1. Pow. 236. 259.

An absolute contract is one by wh a person binds himself or property absolutely & unconditionally. As if in consideration of a lease, covenants to pay rent, or in consideration of money paid covenants to deliver a horse. or build a house. 1 Pow. 259.

4c

A conditional contract is one ye obligation of wh depends altogether, or in some respect upon some uncertain event. upon wh it is to take effect, or to be defeated, enlarged, abridged. 2. Bl. 152. Co Litt 201.

1 Pow. 259
2. Bl 154
Show PC 83

As if A agrees to surrender land if B. returns from India by such a day. – ye condition suspends ye obligation to perform. till ye day. If B does not thus return, ye obligation to surrender is annulled. Ie. L N 1 b. or 1 ap 1 pc – ey

So a promise to pay 100£ to A. on condition yt he marries Q. by such a day. or yt he conveys land by such a time. Perk 712. Sec. 1. Pow 260.

If A sells to B on condition yt on a certain event, B. shall pay for it. £ 10. ; in another event but 5. ye contract is conditional quoad ye amt to be paid. only.

If A agrees to give B for his land as much as B

shall always it is to be work. As obligation to pay is suspended. till B decides y value. Then he is absolutely obliged to pay. Dyer 31. B. Pow 261.

As to unlawful conditions, y effect of ym varies according to y nature of y contract & y condition. 71 Coke 4

If an unlawful condition is annexed to an Executory contract, y contract is void. (ante 20. 35) First

Thus if one be bound in an obligation conditioned for y performance of an unlawful act by either party. as to kill A. to steal, &c y bond is void.

1. Co 7 Z. 1. 9 Co D. 175. 32.5. Co Litt 206. B. Pow. 261

In yse case performance cannot be compelled, because a right of recovery cannot be acquired by y commission of a crime. See Pages "27. "26. 25"

So if y condition is for y performance of any unlawful act. by either party. or for y omission of any legal duty (Ante 30) 2. Bent 189. Co D. 175. 185. 2. Mily 344. 3 Lev. 411. 1. Ld Ym 181. 4 Burr 2225. Co D. 175. 185.

So if y condition mulcts to good order or public welfare. as in restraint of trade or commerce.

In such case y law frees y obligee from y penalty, yet he in any stage of case, if. 12. cases in wh y unlawful act is to be done by him, he shd be under a compulsion to commit a crime. 1. Pow 26. & deprives y obligee from any benefit from it, yet he shd be under a similar compulsion, in another class of cases. viz where y act is to be done by him.

But generally if an unlawful condition is annexed to a conveyance, or contract executed, y condition only is void. The conveyance only is good. Here y aid of law not necessary to confirm y contract, it being executed by y parties. Co Litt. 206. B. 2. Bl C. 157. 1. Pow 261. 2. Second

Thus if one makes a feoffment or grant with condition

y feoffee shall do an unlawful act, y condition wch is void. The Grant is good and y Estate is absolute. Here y feoffee may be under no compulsion, but (supposed) y law secures to him y estate wthout performing y condition. 1. Pow. 262.

48 But y effect of y condition in these two cases, is different y principle is y same in both. — in y former class of cases. 12. where y contract is executory and y condition unlawful y law won't enforce it. In y latter 12. when y contract is executed & both parties are criminal, y law won't aid y Feoffee. & so defeat it.

So y effect in both cases y law leaves y parties as it found em.

But y latter rule holds only when y parties are in "pari delicto" or both criminals. This occurs when y feoffee is not "particeps criminis." as if a mortgage is made to secure usury. "Ante 38"

In such cases y contract is void and thro y innocent party is protected.

No bonds in restraint of marriage are void. The condition being unlawful.

No bonds for withholding Evidence are void. 3. Co. 82 b
2 Ven 149. Esp D. 184.

Bl. R 517. 2. Ld Raym 432. No bonds of secret reward for prostitution, if given beforehand. Esp 182. 3. Burr 1568. Secus if given post. In y former case they are an inducement to immorality. in y latter case not, but "premium pudicitiae." it is said. 1. Bl R. 517. 3 Mis 339. 2. Flowd. 432.

All conditions repugnant to y nature of y estate, are void. As for instance in Fee on condition yt Feoffee shall not alien or shall not take y profits. The condition ante Fars. and y Estate is absolute. 1 Cro Jac 596. 2. Ven 283. 2. Poro 263, 2.

4c. But a bond or covenant y Feoffee yt he will not alien or yt he will not take y profits, is good. for yse don't disable him to alien. B but merely subjects him on his bond. if he does. Ibid.
so bond yt Feoffee shall have y profits, it makes Feoffee tenant to Feoffor. Ibid 4th.

Conditions may be possible or impossible.
Possible require no explanation. 1. Pow 263.4.
Impossible conditions are first, such as are so at y time of y contract made. or such as become afterwards. 1. Pow. 264.

First. If a condition possible at y time of making y contract, but post becomes impossible by y act of God or of y law. is annexed to a contract executed, y contract not avoided "by nonperformance" Rule y same, if y condition becomes impossible by y act of y party granting Co Litt 206. B. 1. Pow 264 5. 11 Mod 268. Co Litt 206. B
it seems if it becomes impossible by y act of y party to whom y grant is made, Pow 444. 6. 1 Co 98.
Co Litt 210. B. 1 Pow 420. (Noy. 35. Sup. L. 5.)
In yse cases y grant is defeated or becomes void.
1 Pow 420. Co Litt 210. b. Post 138. As Feoffment, grant, &c. conditioned yt y Feoffee shall within 6 mths go to London. on Feoffors business. Feoffee dies within y time. The feofmt is absolute. 10 Mod. 208.
1. Co 98. Noy 35. 1. Pow 446.
For y estate is executed and cannot be devested but by y default of Feoffee. Actus dei nyuriam nemini facit" In other words, y Law wont deprive him of an interest already vested., nr he has been guilty of some default.

So of a Feofmnt on condition yt Feoffee shall 50.
within 6 months. perform a certain voyage for Feoffor.
y voyage is then forbid by St. 1 Pow. 444. 6. 2 Plow. 218.

3. Br. P. R. 389. 5 Co 20 b. Cal. 128. 8 Mod 51. 5.
It becomes impossible by act of Law. Municipal
Law. 97. Post 51. 141. 2. P. Wm 218. Salk 198. 8 Mod 51.

So of a feoffmt with condition yt Feoffee make
within 6. months, marry feoffor, and 60 marries
within yt period. Mid. Here performance
being made impossible by y act of y Feoffor. he can't
take advantage of "non performance" the estate becomes
absolute in Feoffee. Ibid

But if such a condition is annexed to a contract Executory
y becomes impossible by y act of God. or of y Law. y
obligation is saved and obligor discharged.
or act of y party.

Rule is y same if y condition becomes impossible by
y act of y party in whose favour y contract is made.
as y obligee. it seems if y Obligor disable himself
to perform y condition, for he cannot take advantage
of his own wrong. 5 Co 21. a. Salk 70. 1 Ld Ld 209. 7 T.R. 384.
He is then liable even before y time fixed for performance
For y contract being Executory, no advantage can
be taken at ye y Obligor. till there is a default
in him. The Law won't subject obligor to a Penalty
nor he is culpable in not having performed y Condition.
2.

1. Bo 338.
2. P. B. C.
126. 28.
Doug 659
Co Litt 206. b.
1 Esp R 430.
2. Str 22.
6. John 119.
5 Co 21. a

31. So of a bond conditioned yt J. S. shall abscond, at
such a Ct. and he dies in y meantime. 1. Pow 265.
J. Stiles Entry, y obligor is discharged.
5 Co 21. a. 1. Pow 265.

If y obligee either prevents or dispenses with y performance
of y condition, y obligation is discharged. 1. East 619. 1. Ch R 53. Str 1230
As obligation conditioned to build obligee a house,
and he prevents obligor from working upon it.
8 Co 92. Cro Eliz 374. Co Litt 206. B.

3 T.R. 590
7 D 383
Doug 264.
659.

If y act of a stranger is made necessary, by y terms of a contract or Instrument, do Ex of a condition being compleed and he arbitrarily refuses to act. Is y
52. obligation void? Quere. 2. H Bl 574. 6 T Ro 744. 5 Co 23. B. 1. Roll 452. 6. T R. 710. Note y case of Insurance vs fire. 2. H Bl 574. 6. T R 710.

But yt was y case of a condition precedent. 6. T R. 710. Suppose y consideration to be subsequent.

If a bond be conditioned for y performance of one of 2 things if one becomes impossible, y obligor is still bound to perform y other. ni y impossibility was occasioned by y obligor. 1. Bl R. 242. Contra. 1. Pow 398. 5 Co 22. 10 Mod. 20. Ex to convey a house or land, and y house is burnt by lightning.

Salk 170.

If y condition becomes partially impossible by act of God or y Law. still y obligor is bound to perform as much much of it as is possible. "Cy Pres" "Cy Pres" a bond for a deed of house and land, and house is destroyed by lightning. Bond for a lease for 60 years, & St afterwards prohibits longer leases yn for 20 yrs, Obligor must make a lease for 20 yrs.
Municipal Municipal Law. 28. Plow 284 Co Litt 352. 219. B.
2 Bl R 371. 1. Pow 448. 451. 2. H Bl 163. 581.
2. T R 254. 1. Smlk. 209. 11. 2. Pow. 31.

If a contract contains a clause making y party bound y Judge, an y condition is compleed with, y clause is void, and y Jury are to decide an y condition is complied with. 2 S R. 408. Resolved in Pensylvania 1888. Yt on an agreement to sell goods for approved Notes, y vendor cannot refuse arbitrarily such as are clearly good. 1 V 1 pg 1 6th V, c. 8.

Second. If y condition is impossible at y time of making y contract, its operation depends upon its being Precedent or Subsequent.

A Precedent condition is one wh must be performed before ye right or estate depending upon it, can vest or accrue.

A Subsequent condition is one ye wh a right or estate already vested may be defeated.

Co Litt 206. 2. Bl. Com 156.7.

Rule. If a precedent condition is impossible at ye time, ye right or estate, wh is ye subject of ye ~~Estate~~ contract can never vest. Tis void "Ab initio" For no right or Estate is created, till ye condition is performed.

Co Litt 205. 2. Bl 157. 1. Pow C. 266.

If ye condition being possible at ye time, afterwards becomes impossible, ye right or Estate, I suppose, becomes void. or it cannot vest. As Lease to A to take effect at and from a certain future day, if before ye day, he shall marry B. & B. dies before yt day.

So if a precedent condition is unlawful, for no right can be acquired by performing an act unlawful. 2. Bl 157.
As Lease to S. to take effect on a future day. if before yt time he shall do a certain illegal act.

Subsequent.

But if a subsequent condition is impossible at ye time, it has no effect, ye contract is in Law unconditional. As a Feoffment with condition yt wn Feoffee shall go to Rome in a day, ye feoffment shall be void.

1. Pow. 266. 2 Bl 156.7. Co Litt 206.

So of a bond with ye same condition, It is Void.

For in ye case of Feoffment, ye estate is vested and in ye case of ye bond. ye "debetur in Presenti" a void condition
54. cannot defeat either. 2. Bl 157.

So if ye condition was unlawful. 2. Bl 20th. ante 47. 8.

But in ye case of Executory contracts, as bonds

Recognizances and ye like, if ye impossible condition is incorporated with ye body of ye obligation, instead of being underwritten or endorsed, ye whole obligation is void. 1. Pow. 267. 1. Sal 172. For then there is no "Debitum in presenti" no distinct penal part creating a debt, i.e. present debt. Tis rather in ye nature of a condition precedent and must be so in effect I think, in every case of ye kind.

The common distinction between Special and Simple Contracts, "see Consideration Post"

Written and unwritten Contracts

There is a distinction between these contracts introduced in certain cases, by ye St of Frauds and Perjuries.
29. Ch 2. 2. Bl. 159. 1. Bac 72. 1 Pow. 239.
Our St on ye same subject was enacted in 1771. and is, so far as it extends to ye same subjects, substantially a transcript from ye Eng. St Com 334.—
Similar Sts in most of ye States.

Under ye St of Frauds and perjuries, ye following contracts or agreements will not support an action at Law. or in Equity. ni ye agreement or some note or memorandum of it, is in writing, signed by ye party to be charged. Or by some other person by him authorized.—

First. promise by an Exr or admr to answer out of his own Estate, for any debt or duty of his Testator, or Intestate, such a promise not in writing dont bind him.

Second. A promise by one person to answer for ye debt, default or miscarriage of another.

3. a promise in considn of Marriage.

4. Contracts or Sales of Land, commonly by an instrument in writing concerning g m. By contracts or Sales are meant Leases as well as Sales.

5. By g eng. It is provided, yt all parol sales or leases of Lands &c of any interest in g m. shall operate as Leases or Estates at Wile only: nu Leases for a term not exceeding 3. yrs. reserving a rent of 2/3. of g improved value. 4 TR 680. 3 Do 16. 8 Do. 3 – Rob Frauds 240. 247.

But g former are now holden tenancies from ly^r to ly^r 8. TR 3.

In Comm all parol leases &c are invalid. St Comm 216. I are placed on one footing

5. Contracts not performed in one yr. from g time of making g m.

5. 6. Contracts for g Sale of goods, g £10 value or in Comit at 35. 4d. It extends as well to executing contracts as contract g Sale to be executed immediately.

Rob. St Frauds. 111. 2 HC Bl 63. 7 TR 14.

5 8. The object of ye St is to prevent g hardship of contracts of ye description yt Parol Evi, it being supposed there is danger of fraud and perjury in doing. 1 Ser. 202. Nance v Elliot g St.

Right re to promises by Ex B.

(Ces 125.6 7 TR 350. 5 Do. 8. Str. 873. Rob. St 1. 206. 207.) It has been said yt if g Ex^r had assets to answer his parol promise all bind him as assets constitute a consid^n advantageous to himself to do so to transfer g auth to him personally it. in his private capacity.

There no authority – not Law. (semble) see Post 60. 7 TR. 350. & 1 Roll. 206. 7. Str 873.

The duty ant transferred to him personally (it. in his private capacity) by assets. The mere possession of assets concern him only as Ex^r. Besides g Ex dont proceed on a distinction between agreements upon consideration & agreements without any. For a promise by Parol

without consideration would have been void before the Act was made, & of every parol promise when consideration is good. Since the Act it goes in as a Dead letter. "Post 10"

If Joint obligee & assets mix clearly the same as implied promise to charge the Executor personally. 5 B & Ald. Coll Ca 164. 5 TR 690 7 Do 350. 51.

J. Once holden contra by Sir Henry cited Crosp. 288. 7 T. R. 350.

Administrator submitting a claim against him as "Debtant" was once holden (Peter) to be an admission of assets. 1 TR. 691. 2. This opinion is overruled, 5th & 6th. 7. Ind 453. Coll 465. 4 464. 5. "Awards 10"

For an Admin. may be desirous of knowing or ascertaining the existence of assets, or their amt without knowing or he has assets.

But if in such submission & arbitration award the Admr shall pay a certain sum, he cant post deny assets, but finding of assets to the amt 7. TR 453. Coll 465.

Same rule as Exors see post 10.

Once holden that payment of Interest by Exr was admission of assets. As to amt of the principal, or rather the time of "Onus probandi" on Exr unreasonable and was overruled. 5 TR 8. Coll 464.

But acceptance of a Bx by trustee's Exr is an admission of assets. Secus 3rd persons might be defrauded, besides the acts clearly imply admission. 1. H Bl 622. 3 Mly 1. 2. Sts 1260. 2. Burn 1275. Ch. B. 823. 112. Ch. 60.

So is a Transfer by holder, Exr Ch. 112. "Post 60."

2 Sts 1260. 3 Mly 1. Ch. Bill 111. 12.

And tho' the promise of Exr be in writing, he is still not bound, in some states contra is shown. So assets in his hands is forbearance of a Suit vs him. For tis a simple contract only. 7. TR 350. note.

1. Ves. 125. Coll 464. Crosp 293. L — . p 8.

The mere fact of Testator was indebted, not a valid
as a consid.
For the object of the St. is not to make Exr liable
at all events, & in all cases, when the promise is
written, but in those cases only in wh he wd have
been liable on a Parol promise. 7 RR 350. n. Rob. St T. 202.
1. Bes. 126.
And to make the Exr personally liable on his promise,
in writing, there must have been an existing claim
wh bound him as Exr. Secus if there can be no
consid. 2. Saun. 130. Cro J. 47. Rob St Frauds 200. n.
Rob. 2 Vol 6. N. v. 1 7 VL 40 VB4 VV
The consid. must appear in the Writing. Ante Wilkes
5 East 10. 6. 20. 307. Post 84. 71. Rob. 110. 207
For the St requires the agreement to be written and the
term mutual, & consid., i.e. the consid. must appear
in Writing. 7 L 82 – 1. 6 1 5 V 1 6 1 2 4 7 1 6 7
Quere in Const as every writing here is said to
be sealed to be a Specialty. Sed Quere. hoc. Post
102.
To take advantage of the clause, the def must have
been Exr and when he made the promise. Rob 201. 210.
Amb 330. A promise by one in consid. of being
made adm. is not within the St.

61. Not necessary to aver assets in an action on the promise
For the def is subjected to the all "de bonis non propriis"
Rob 205. 6.

Second to answer for the debt, default or miscarriage of
another. Under the clause the general distinction is to
be observed. If the promise made for the benefit of another
is original, to vendee, to be paid. Secus if collateral.
In the latter case his a promise to answer for the
debt and default of another, in the former it will.
2. La Ray. 1007. Cowp. 227. 1. Mils 300. Cb D. 101. 2. 3 Barr
1868.

Note y words Original & Collateral

An original promise is not a promise to pay another's debt, but our own. Collateral is to pay another's.

A promise is said to be original. First. when y 3d person for whose benefit it is made, ant liable at all. (for y same debt or duty) to y Promisee so yt there is no debt on his part.

Rob. in So 209. Pea Cas 212. Bull N.P. 281. 3 Burr 1921.

Secona. When his liability tho' before existing is extinguished on y promise being made. Rob 223 4 Questioned Post. 3. when there is a new consideration arising out of a new & distinct transaction or "res gesta" and moving to y Promisee. Cth D. 101. 2.

5 Mod 205
2 Mil. 94.
1 Do. 306.
2 Day 455.

So yt y original debt is only y measure of what is to be paid for another yt. 2 East 325.

For whenever y case answers either of y above descriptions y promise ant in construction of Law or in effect to answer for y debt of another.

But when y promise is of a subsisting & continuing liability (for y same debt or duty) on y part of such 3 persons or to procure credit for him. (i.e. when y promise is to furnish an additional security or remedy) it is collateral and therefore within y Stat. For these distinctions, &c

For in all such cases y promise is in effect to answer for y debt of another. 2 TR 81. 1 H Bl 120. Sd Ray 1637. Rob. 209. 216.

First. W R says to a Merchant, "deliver goods to S S and charge them to me, or deliver them on my account, or deliver them and I will pay ~~you~~ You. y promise is original. for S S ant liable at all. A is y original debtor.

Tis not a promise to answer for y debt of another but his own.

Cro J 102. But if a had said, "deliver to J.S. "at Sarum" and if he don't pay. I will," tis collateral. Cowp 227.

Cow 227 1 Ph 186 120 La Ray 1086. Salk 28.

Here y intent is, yt y charge shd be in y first instance to J.S. y receiver. He is therefore y original debtor and y promise is of course Collateral.

Tis therefore a promise by A to pay B.'s debt, in aid of his liability and to procure credit for him.

To supply my mother Law with bread, and I'll see you paid. – holden Collateral, or rather according to latter opinions, "prima facie" so because of y presumed intent as in y last case. "Salk 58. Contra. obiter." Cited 8. T R 80.1. Rob. 223. La Ray 224. B et P. 158. Rob 223. Contra 58. Salk. now done away.

54. La Mansfield said, yt such a promise before y delivery of y ~~promise~~ property, was original there being no liability on y first person. cited Cow 228. 91.

This opinion however has once been overruled 2 T R 81. Rob St Trinds 203.10. Sed Quere. an La Mansfield construction of y promise wrt correct.? In other words. an y intention is not, yt Promise or shall be made y debtor. in y first instance. At any rate to more holder yt when y promise is in yr form, y Ct in court in collecting y intention are at liberty to consider all y circumstances of y case. & y situation of y parties. 1. B et T. 158. Rob. 212.

To supply such a Seaman bound to Canton, with necessaries for y voyage & at y end of 3 mths. I'll see you paid. – y Seaman having no fund or means of paying here.

This I consider original, as owning an understanding yt y necessaries, must be charged in y first instance to y Promisor.

"If you don't pay I will pay you" and if you
say you will, "Collateral" if it be first
stages. Such is the evident intent.

Rob. 210-11. 2. T.R. 80. Esp. D. 101-2.

If a promise by me is in consideration of your
letting a horse to P.G. he shall deliver, P is Collateral.
This is plainly undertaking for the default of another.
i.e. giving him credit. Rob. 232. For P is liable on
the Bailment. 1 Bac. Ab. 6. 7. Rob. 219. Salk. 27. 3 Ld. 15
6. Mod. 258. & 48. Ld. Ray. 1085.

65. Thus if he would not be liable. As if A promises
B. in satisfaction of what B shall pay, and if not yet
he ("A) will, B. not being bound to it)
the promise is substantially original, tho' in form
collateral. For B can't sue at all. As if let me a
horse and I'll shall pay you." If he doesn't, I will.

Rob. 223.

So if an Agent buy goods at auction, and don't
name his Principal, the agent is bound with writing,
for he contracts for himself. 3 Burr. 1821. Par. Cri. 213.

"Semble" To make the promise collateral its necessary
that the 3d person for whose benefit it is made did not
only be liable on the same consideration, but yet he shd
become liable at the same time, that the other promise
is made.

And when the same contract, wh the promisor makes
or assumes. So the two last cases.

If after goods are delivered to P.G. yet they shd be
charged to me, he shd contract to pay for the me my
promise is still original. The man not liable, when
I promise. H. But as a General Rule, a promise
of a 3d person shall be an act, for not doing wh
he wd be, liable, is Collateral. Ld Ray. 1085, 6. 7.

Rob. 219. 223.

If the promise is by one of several persons already liable
it is original and not within the Stat, for it don't
pay the debt of another. A promise in pay costs by 1 of 2. Defs.

2. Ld. 325. 5. Mod. 205. Bomberb. 382.
Rob. 229. 213.

1. Burr 373. 3 Lev. 363. Ld Ray 1085. When according to ye declaration under ye 2d clause of Cases ye promise is original, ye common action of Indebitatus assumpsit" (not stating ye special agreement) is proper. For ye Promisor is ye original debtor. Secus when ye promise is Collateral. Then a Special declaration is necessary. As upon a Written Collateral promise. For he is only a Guarantee.

Second

et promise in consideration, yt promisee will relinquish a debt due vs a 3d person, is original. For it amt is not in aid of a continuing liability in ye third person, or to obtain credit for him. As turn v Ds bond and P will pay ye debt. 3 Burr 1888. argument admitted and R. 30. 1. Cont Rob. 133.

Rd P. C. sed Quere. any rule amt correct? What is promisor to pay? not Pl's debt. It is relinquished. The former debt vs Pl. is only ye measure of ye amount to be paid, or a rule of damages. and ye consideration is purely extra, it being disadvantageous to Promisee.

Where Promisor is purchaser of ye debt of another, his promise to pay for it, is clearly not within ye Stat. Rob. 220. 1. N R 130. 2. East 820.
This is a promise not to pay ye debt of another, but to pay for ye Transfer of it. As transfer to me. Pl. rend. and I'll pay you ye amt of it. like a promise to pay f. any chattels purchased.
see. P. 62. * for ye Rule.

3. in where Land Lord came to distrain Lessee's goods for rent Pl. to whom they had been assigned, promised to pay ye rent. if ye Land Lord wd not distrain. Stolen. goods, Lessee remained Liable.

Plff. had a Lien, wh he gave up. in favour of Defy. on his promise to pay. 3 Burr. 1885. 3 Esp. 86. 1. Do 121. n Pea Evi 213. 2 East 325. 3 East 325.

The consideration arising in y last case out of a new & distinct transaction P moved to y Promisor in y abandonmt of a Lien (wh was a valuable ~~consid~~ interest) in his favour. 2. Burr 1886. 1886. Rob. 232. 3 Esp Re. 86.

Twas in consequence of y. fund being disincumbered in y favour. The debt was only y measure of y sum to be paid. – like a promise to pay another for resigning y to Promisor. Salk 25. Ld Ray. 759. 3 East 86. 3 East 325.

4th. When one is under a moral obligation to pay for a benefit received by another, a Past promise by y former is Original & will bind him. as medicine furnished a pauper, y overseers afterwards promise to pay for it. – y promise is binding – not treated as a promise to pay another's debt.

Bull N.P. 281. Pea Evi 213. Thomas Mansfield

Miscellaneous Rules.

A promise to pay a certain sum in consideration of promisee's withdrawing a certain suit vs P.S. for Assault and Battery. has been holden original. for there was no debt due from P.S. : Pl. didn't aspheay yt there was any default. in him ever.

1. Mly 305 7 TR 204 2. Day 487. Pea Evi 214. Rob 208. 33.4.

The promise was not for performance of some duty, P.S. was never liable to pay y particular sum promised, or y particular duty wh y promise was intended to create. "ante 65"

There must exist vs a 3d person a debt or duty ascertained or capable of being ascertained at y time of y promise (Rob. ut Sup) to bring y present case within y Stat. "ante 65"

1 a or B 50 Dle Rob 208. 33.4.

But a promise to pay in consideration of Principal staying a Suit brot by P.S. for a debt is Collateral. The debt subsists to P.S. P no interest or Lien assigned or abandoned as in y other case. by Promisor
2. Day 455.

And a promise in consid^n of Promisee's abandoning an action of Trover, to P.S. y Promissor would pay y damages, is collateral. P within y S. 2 Day 455. Same duty. It is to pay y same & sum wh. P.S is liable to pay. 1t. y value of y property.

Suppose y promise to be in consid^n of Promisee withdrawing y Suit, wd it not be good in Eng as Retraxit - as retraxit disables Plt ever to bring another Suit. 2. Bl. 295. So yt P.S. liability is extinguished. In Comm not good, y Retraxit has no such operation.

Promise to pay P.S. debt if Plt would release P.S. taken on mesne process, is collateral. Suppose for y debt continues, P.S. may be arrested again. See Sh. D. Secus P conclude if he had been taken on Final process. P was released. For releasing him wd discharge y debt.

Some have supposed yt where there arises a new
69. consider^n, a parol promise to answer for y debt
of another is good. Whether y consid^n moves to
promise out of a distinct transaction or not.
P an y debt is discharged or not. 3 Burr 1887.
Amb. 830. as forbearance of a Suit. Ld Ray. 120.
(R. P. G.) but ye cont Law. See y last page
and P 58. 2 Wils 94. Rol 233.2. Bull N.P. 281.2.
2. Day 457. 7. T. R. 201 Str 873.

The stat wd be regulary and y rule under it y same as at Ld Law. Rol 239.

For, a Parol promise wd not be good at the Law, nor
consid^n, if it were new, good. Whenever there is
consideration, y Seal would have no effect. and the
y promise is in writing tho' not with consider^n.

Th. A written promise to pay y debt of another, if he does
not, is discharged by promisee's granting forbearance
to y debtor. — Here there is a tacit understanding yt
y creditor is to collect of y debtor, if he can.
A Judicial confession by y Def accepting
receipts of pmts, with prevent y application, be
under pleadings and money paid into Ct.
Rob 238. Cro R 15. Pea Evi 104. Pea R 15.
For y parol promise is not made void,
as a promise, y Ct merely excludes Parol Evi to
contradict it.

When according to y above rules, y Promise must be
written, to be binding, it isn't necessary in declaring
to aver yt it was written. Sufficient if it appear
in Evidence. For y St introduces a new rule
of Evi merely not a new rule of pleading. 1. Saund. 9. a n. 1.
3 Burr 1890. Rob. 202. Raymo 450. Bull N P 279. 3 Ke 156.
2. Ch Pld^s 214. n. o.

71. This rule holds as to all contracts, contemplated
by y Stat. 2. Root 146. Cowp 289. 12. Mod 570. 4. Bac 655. Ses

Demurrer to y declaration confessed a promise in
writing. 1 Root 1,3,7,7 & 557. n. or rather perhaps
it cannot be gotten under y Demurrer, yt y promise
isn't in writing. 9 R & v. 2 v b

Seems y such a contract is pleaded in bar of
another action. Rob 202. n. 2. Wils 49. Pals. 217. Ray. 450. Bull N P 29 q^n
Greater strictness is required in a bar yn in a declaration.
But tis necessary in declaring as well as in pleas
in bar, to show a consideration. 7. Ke. 350. Rob. 202

A contract by Parol to pay ye debt of another, and also to some other thing, is within ye St in toto. For if one entire part of a contract is void, ye whole is so. No Severance. Both parts must be declared upon.

3d Agreamts in consideration of Marriage.

72. This clause relates not to promises to marry. — These are good by Parol. Contra 1. Lev 65. 411. overruled.

It relates only to agreamts in consid^n of marriage i.e. such as are made by way of marriage, settlemt or Family settlemt, or provision. Burk N.P. 280. 1. Salk. 179.
1. Pow 277.8. Ld Ray. 386. Str 38. Rob. 190. 1. P Wm 618. Pre Chy. 520.
These to be binding must be written and signed
1 Pow 297.81. no exception in ye Statute in case of Part performance
1. Post" Formerly awarded an a Parol agreamt of yo Rent would not be good, if it was stipulated yt it shd be reduced to a Writing. P Wm 279.
1. Eqty Ca. 19. 1. Ch. Ca. 135. 3 Atk 574.
But such stipulation makes no difference, Semble and don't take ye case out of ye Stat.

73. If however such stipulation is made and ye Execution of it is prevented by ye fraud of either party ye marriage
Rol 138. takes effect. Equity will enforce ye agreament.
1. Eq Ca. Ab. 19. Rob 130. 7. Pow Chy. 526. 1. P Wm 518.
But yis is done by way of relief as fraud. & conclude. executory, ye agreamt being ye means of relieving ye fraud.

And a Parol promise made on one
Str 230. side in consideration of marriage is a suffict consid^n
2 Lev. 140. to support a Settlemt made in pursuance of it
1. Ves Jr 190. on ye other side after marriage, or to support a
Rob. 197, 200 promise in writing after marriage.
For ye St don't make ye contract by Parol void

but merely prevents y proof of it by parol testimony in support of a Suit.

A Letter signed by one party is a Ge writing within y Stat. 2 Bro Chy 32. 3 Do 318. 1. Ponth 179. 1. Ves Sn 330. Pre Chy 560. 3. Atks 503 Rob 190. 1. 105. 1. Pow 287. 8.

But it must appear yt y other party accepted y terms contained in y letter, and acted in contemplation of y in proceeding to marry. Otherwise it ain't binding. Thus where y Party to whom y letter was sent was ignorant of y Proms contained in it at y time of y marriage, it wasn't decreed. As where a wrote a letter to his daughter wh was not shown to his intended Wife. 9 Mod 3. 1. Ponth. 179. 2. P. Wms 65. 1. Pow. 287. 290. 9. 1. Ponth 193. Rob. 192. 3. 107. 8. 1 Ponth. 193. There was no agreement. 9 Mod 3.

A Letter written to one's own Agent stating y terms of an agreement already made by Parol has been held... sufficient. 3 Atks. 503. Rob 121. This wi not a written agreement is a written Memorandum of it Post 92. 3. 99. 99. Pr Ch. 560. 74.

It must furnish distinctly y items of y Agreement Seems tis uncertain. Pre Chy 560. 1. Ponth 179. Pr 426. 1 Atks 12. 1. Pow 290. Rob. 106. 191.

4. Contracts for y Sale of Lands, or any Interest in them. Post 59.

Lands &c, A thing annexed to Land, if sold in contemplation of severance, ain't within y Statute. As Trees growing. Crops. 6 East 602. 2 Selw 862. 11. East 362. 1. Bos Pul. Ld Ray 182. 1. Com. C. 74. to 80. Pa. Evi 214. 3 Lev. 65. 337. 3 Day 476.

And a Parol agreement between y agrcm owner and Occupier of Land, yt each shall have a certain part of y Crop – is good. Semble. 1. B et P. 297.

For y crops aint considered as Land. By y Eng St Parol Leases for 3 yrs are good. Such agreamts however appears to be good independant of y St

Formerly doubted (as under y last head), an. Parol contract wd bind or not. If it was part of y agreamt, yt it cha be written 1 Pow 279. 83. Vern 157. y. 1. Eqty Ab. 19. Now settled yt y now makes no difference. 1. Pow 281. 3. 1. P Wm 770. 1 Vern. 221. b. Rob. 147. Pr. Ch. 402. 2. Br. Ch 500. 565. 6. 465 6. Ver Pr 45.

It has been holden in Court yt Parol promise to pay for Land bot, is good. But our Ct of Errors have decided yt y law dont imply a promise to pay the value. 1804. Then decided in Court yt a parol agreamt by Grantor at y time of Grant to pay for any deficiency in y supposed Covenant was within y Stat. 1 Root 77.8. Contra Since 1. Day 23. 3. John. 505. 1. Ohio 418. 1 Root 479.

Suppose no obligation given for y purchase money, might not a bond be had.? It would contradict no writing. and y subject matter of y promise is only money. But parol agreamts for Lands are binding in some cases y that nothwithstanding.

76.

Such agreamts are good ~~of~~ under y Stat of Frauds consistently with y Spirit of y act, and y rules of Evidence. There is no inherent probability in y contract. The difficulty is in proving it. The ~~Stat~~ Stat merely introduces a new rule of Evid to prevent Fraud & Perjuries. E.S.G. ~~yt~~ y Stat ought to be liberally expounded. 1. Bl. 601. 1. Bl 87. 88.

First

When there is no danger of fraud or perjury, in enforcing y agreamt, y case is said not be within y Spirit of y act. As if in a bill filed for y Specific performance y Def in his answer confesses y agreamt, no danger

of fraud or perjury in acting on such proof.
2. Br Chy 568. Ves 221. 441. Pre Chy 208. 374. 3 Atks 3. 2 Br. 100. 55. 1. Bro. R 600.
amb 586.

Besides, says Pow, y contract is in writing & y answer. 1 Pow 297. But ys ant a sound reason. For ys says if y Def dont insist upon y Stat, he is clearly bound. +

So if he expressly submits to a decree of performance, Rob. 150. And if Plff alledge a mutle agreamt Tri of a parol one, will be good. If Def does not insist on y Stat, Rob 150. Sure as to y first Examples if Def (admitting y agreamt) insists on y Stat his Plea, can y agreamt be enforced. enforced.

Pea Evi 216. 4 Ves Jr 23.

That Chy wd decree it, tho y Def had not insisted in not performing it. 2. Atks 207. Def ant insist 2 Atk 155.
on y Stat, by pleading. yet he having confessed y agreamt in his answer, y Plea was overruled, and Ex of y agreamt decreed. 2. Br Cy. 508. Pree Chy 208. 374.

In 1. Ven Ab. 600. mile lind down generally, yt an agreamt confessed is out of y Stat – Decided Contra at Law. tho y Def having confessed y agreamt by answer in Chy, insists on y Stat, he ant liable on y agreamt. 2. Atk Ab 63. 0. Ves Jr 548. Rob 228. Rob. 157. So y La Roselyn. 4 Ves Jr 23. See Ld Ray. 3. Ch. R. 1511. So by Baron Pre 2 Br Chy. 503. 4.

2. Br Chy. 125. 69 y Plea of y Stat was allowed by Ld Thurlow. tho y agreamt was not denied but ys decision was on y special circumstances of y case. Ibid 569. The agreamt was incomplete – only general heads by way of instructing to Atty – particular terms not settled. Locus poenitentiae was taken. La Ray 160. Str 558. 9. 6. B. P. C. 45. 3 Ibid 567. 8.
Here y agreamt want confessed. It remain

2. Br Chy 559. mutle

79. "Quia [illegible]" 1 [illegible] 1[illegible]. 1 [illegible] 100. [illegible] 211
see also Pole 238. Here it is said it seems to be
many settled yt they may admit, agreement and
mean y Stat. [illegible] 548. 4. n. Pl. [illegible]
210. [illegible] y Stat. [illegible] remedy, [illegible]
agreement, y rule itself, yt confession with another
takes y agreement out of y Stat, seems arbitrary and
groundless. 2. Br Ch. 557.

And if y Pl knowing y agreement to be by Parol can
enforce in one case, why not in another? as little
danger of perjury in one case as in y other.

Tis also a question mooted an a Def in Chy on
a bill for a specific performance of a Parol agreement
for y sale of Land is bound to confess or deny it
in his answer? 1. Ventr. 168. 70. Decided by La Manchester
or Macclesfield, yt he is. Case cited by La Thurlow
2. Br Chy 556. Whitfield 211. 2. Rob 156. 7. 2 atks
80. 155. 4 bes Pl. 24.

La Thurlow is of y same opinion and yt y only
effect of y Stat, as to proof of y agreement) is, to
prevent y Pltff from proving it aliunde. 2 Br Chy
557. 1. Ventr. 170. Rob. 157. 1. Vent 170.

La Macclesfield, Mansfield, Hardwick and
Thurlow. hold or held yt confession takes it out
* now La Rosslyn. of y Stat. * * Lds Lufborough, Eyre, Ashburton
and Eldon of y contrary opinion. 2. H. Bl. 68.
Because compelling a Def to answer, a parol
agreement lays him under a temptation to commit
perjury. What then? Dont yo objection hold in
every case equally, in wh Def in Chy is bound
to answer,? Perjury by Def. is not what y Stat
intended to prevent. Besides yo objection might
be urged as compelling an answer, if y agreement is written
in wh case y Def is clearly compellable to answer.

If he is bound even as to deny, it seems to follow
yet he can secure to the agreement out of the Statute
and insisting on the Statute will not avail him.
Hobb. 100. For if it did not "Cui bono, compelled
him to confess or deny. 1. Ton 11. 171.

In Eng. It has been holden at a sitting that a
Parol agreement for sale of Land & that he lends it
to owner, shall be bound by it. There is a previous
intention out of St. 3. Car 40. 1 Ver 203. This cannot
be Law.

Upon the same principle viz. that there is no danger
of fraud or perjury, in the proof of a parol contract
for purchase of Land at a bonafide Sale before a
Master in Chy. under the order of the Ct is binding. 81.

Br Chy 334. 1. Pow 271. 74. Rob. 115.

How could it be, how the Stat made the parol contract void?
So a parol contract between 2. Solicitors in Chy
in a suit between Mr & Mrs was decreed.

3 Bro Chy 331. Rob. 115. n.

Again Lord Ld. Several opinions parol agreement
respecting an interest in Land, if inseparable from
circumstancial facts in writing with there is no
danger of perjury, is binding. As Sale of Land
by absolute deed, but vendor at the Ex. gives an
obligation to vendee, the amt of the consid. remains
in possession, pay the rents, dont account for the
profits — pays no rent and pays Interest on the
Obligation.

From these facts this raise a Trust is implied
for vendor. It, he is considered as the by on the
of a Parol agreement implied or intered. Pow. Mr M. 65.
3. Rodes. 429. 2. Ves 376. 2 Atks 71. 2 Br Chy 526.
Salk 60. 21. Ves 424. 1. P Wm 381. 2. Bro 549. 1 Vern
108. Langford vs Newburn. Sup Ct, reversed by
Ct of Errors. Tod Lucre. No such Judicial
decision.

2. Other Exceptions to y General Rule, introduced by y

82. It are admitted in y Construction of an act made to prevent Fraud, yet not to remove such a construction as would protect and encourage it. 1. 3. P 650. 1. Pow 224. 5. 1 Ton 6. 17. 2. For y act is to be liberally expounded, 1. P.B. E. 08.

Yet when a party fails not performing a parol agreement will practice a greater Fraudy on y other yn wd result from a mere breach of y agreement itself, he is Generally holden to it in Chy. Rob. 131. 2. 8.

83. Therefore a parol agreement performed or partly performed on one side, at y request and with y consent of y Party, will bind y Latter: as if Leases to B by same for 20. yrs. B enters under y leases and begins to build or incurs expences in Improvement, y contract is entered in Chy to Lessor, or resta

Rob 130. 2. 138.

1 Ton 16. 172. 1. Ab. 600. Str 783. 3 Atk 100. 1 Ves. 83 297. 1. Vern. 159. 363. 2. Dr. 373. 1. Pow. 286. 3 Ves 378. 7. Ib. 341. Otherwise it might be the advantage of his own fraud. For his accepting, or permitting part performance by B (not intending to perform himself) is in itself a Fraud. 3. Mod 37. Pr Ch. 561. 1. Br Ch. 417. 1. B. et P. 8 347. Besides, y act done affords presumptive Evidence of agreement and thus y danger of Perjury is diminished. 1. Pow 209. Quere an y s circumstances has any Operation? Rob 13. L. 8. 131. 2. 8.

Quere such case, y agreement has been informal, tho y terms of it were not precisely settled by y Parties.

Delivering possession of Land, in pursuance of a parol agreement, is a satisfactory part performance by Vendor.

2 Vern 363. 435. Pre Chy 10. 518. 1 Vern. 355. 2. Eq. Ca. 48. 1. Pow. 299. 305. Str 783. 3 Br Chy. 7. Ves Jr 747.

2. Mod 37

A fortiori to so, y Purchaser being let into possession but builds or makes improvements. 1. Mod 303. 4. Str 783. 1. Pow. 7. 9.

And taking possession under y agreement is deemed only notice to a purchaser, tenants, not of y first purchaser under y agreement who stood in their.

No payment of money as part of y consideration of a purchase by Parol agreement has been holden to be such a part performance by vendee to take y case out of y Stat. & as y money may be recovered back.

1. Pow 304.5. Rob. 153.155. Pre Chy 560. 4 Bro 720.
3 Atks. 2. 1. Bro. 83. 222. 1. Lev. 175.

Contra 9. Bro Pa 234. Sugden 74.81. 2. Com. C. 82. 2. Eqty Ca. 45. 1. Coles and Lefroy 240.

The General opinion seems to be, yt payment even of y whole purchase money dont take y case out of y stat.

1. Mad Chy 302.4. 3 Bro Pa 712.382. 1. Ds. 221. 6 Bro. 32. 3rd 85th

But payment of Earnest, Pre Ch. 560. 1. Pow 5.4. & 1. Root 53.54. is by all opinions not a part performance.

This is not in any sense in part performance, not subsequent to D in pursuit of y agreement but a mere solemnity in making y contract a form in stipulating.

In y. Says Pow. damages may be recovered at Law for Nonperformance 1. Pow 308. Quere for payment of Earnest does not take y Case out of y Statute. Pr Ch 560. Rob. 154.5.

The Earnest money itself may doubtless be recovered back. Quere an y receipt of y money in part performance may be proved by Parol. 1. Pow 347.8. If not y rules itself yt such part Pmt take y Case out of y Statute seems Idle. Rob 153.4. Pa 3. Atks 4. It was proved by Parol.

And a Parol agreement in Part performed by vendee, would be decreed as y heir of vendor. 1. Pow 299. 2. Atks 2. Such 304. But to take y Parol agreement out of y Stat. on y ground y act done must be such as would require y party claiming, unless y agreement were enforced. Hence part performance by one of y

303.

Rob. 138. 152. 6. Br. P.C. 45. 7. Ves Jr. 341.

parties, wont entitle ye Wife to a Lease. Post 87.

86.

And ye act claimed to have been done in part performance must be such as in ye opinion of ye Ct would not have been done but with a view to perform ye agreement. Lease tis not now considered as part performed. As Lessee continued to take a new Lease and continued in possession. & continued in possession. This wasn't such a part Ex as to take ye case out of ye Stat. Lessee only remained only as he was before. 1. Bro 309. 2. Br Chy 561. 3 Bro. Pa 378. Roberts 139. onward 151. 152. 3. atks 4. Ambler. 585. 1. Ventr. 175. 1. Br Chy 412. 1. atks 12.

Giving possn is suffic. (ante 84) seems giving directions for conveyance. going to receive ye Estate &c These are merely introductory or auxiliary to a Conveyance. Post 3 Bro. 36. 379. 1. Madox 30. 3. 4. 364. 3. 1. Ventr 175. 1. Br Chy 412.

Rob 139. 140. 152. Amb. 586. 3 Bro Br 34. 37. 3d ed. 0. Bro. 41.

87. Marriage of itself not considered as a part performance a Part agreement &c. in consid. of marriage. For to ones a such evidence. they are not to have effect in ye marriage takes place. To consider marriage thus as a part performance, dispensing with written Ex i would take every case out of ye Stat and Leave ye contract as at Law.

Br Chy 551. Str 738. 1. P Wms 615. Rob. 196. 8. 1. Bro. 309. 1. Bac. Ab. 74. Title agreement.

But tis said yt a parol contract, in consid. of marriage, by a 3d person, as a Father to one of ye Parties is taken out of ye Stat by marriage. if it takes place with his consent.

Seems a Fraud would be affected on ye Parties by Marriage 1. Ven 293. 2 Vern 373. 1. Ven 297. 8. 309.

So when ye wife was allowed by ye Husband to receive ye Interest of a certain sum during coverture, wh he had before marriage agreed to settle to her Separate use

y agreamt was adjudged binding, tho said, on y ground of part performance. 1. Ves 304. 1. Ves. 297.
Quere wd his land be bound by his own performance Twas prejudicial to y Wife. Note y plea was laid in y Court and y agreamt decreed on Special circumstances. ante 85.

To cutting down timber in pursuance of a marriage agreamt was held a satisf part performance, to bind y other party. 1. Ves 304. 2. Eqty Ca 29.

Courts of Equity have holden yt part performance in pay of money, dont take a parol agreamt out of y Stat. Chec holden by Sup Ct yt a complete performance on one side by paymt of money did 1 399. and yt Ct have since holden part paymt. see 2. Day 225. yt paymt of part and making repairs takes out of Statute. 88.

Upon y same principles it, to prevent Fraud, even a written agreamt or Contract respecting an Interest in land, or any other subject may be contradicted by proving a Parol agreamt to y contrary if there was a fraud in y Execn of y Instrument, the Grantee having obtained a deed, refused to execute a Deposition according to y agreamt, 3 Atks. 389. Rob 130. 131. 1. P Wms 620. 1. Sondb 188. 2 Atks 203. 1. Ves 294.

Quere case of a Tharkisman 3 Atks 389. deceived as to y contents of a deed. Proof of Parol agreamt being y necessary means of proving y Fraud.

To a parol contract of any kind may be proved when its only inducement to an action for fraud. For y action is on y contract. 2. Day 531.

And y agreamt is but an Instrument or means by wch y fraud is effected.

To yt proving y agreamt is only Means of manner in wch fraud is practiced and thus in effect proving

2. Day 531. made y fraud def. No action for a conspiracy to defraud P. H. of a Tale of Land.

The same may be done in y case of a mistake in y Ex.

To a written agreement (ut Infra) may be entroduced by a Parol one to rebut an Equity. A written agreement afterwards discharged by Parol. Poo Ch. This Rule is peculiar to Equity.

In Eng by St 11. Geo. 2d 2d "Indebitatus Assumpsit" lies on a parol Lease and y arrears as to rent may be given in lieu to ascertain y damages. Ess 20. 105 Ven 2 52. 2. 3 P. 129. 1. Ld Raym 375. 1. Wil 34. 1. Str 335 235 Ess 20. At ye Law assumpsit would not lie for rent, Mr Abt would. Esp 20. Wilson 34. Doug 234. Hob 284. 1. Ch R. 5. 1. Rob. Ess 20. 558. 44. Bro P 242. 3 Ter 100. Bul 15. Pea Ev 241. 3 Ore 234. 2 Com Con. 56. Ele being considered as y higher remedy. Lure as a y principle.

In Comm such a Lease does not create a Tenancy at Will. It is a mere licence, but yet lies on a "Quantum valebit" 4 Day 228. Ess 20. 1. 1. Ld Raym 375.

5th Contracts not to be performed within one year from making, are to be an act 2 yrs hence.

Holden yt ye clause don't extend to any agreement concerning Land 1. Poo 2. 6. 1. Com 109. 3 Ld R 32.

Because I suppose y preceding clause has made all y provisions intended c be mere as to contracts of yt kind. They are generally of no effect, whenever to be performed. Suppose then a Parol contract of ye kind 12. concerning Land not to be executed within a year. Confessed or partly executed, tis

binding & conclude. 1. Root 9.

When y performance is to take effect on a contingent event, wh may or may not happen within a Year, y contract aint within y Statute. as on y return of a Ship. Salk 280. Bull N.P. 280. Str 506. 3 Burr. 1278. Ld Ray. 316. 17. 673. 3 Salk 9. Pea Evi 214. 3 Burr 1281. Pea 214.

So to pay on his marriage.

Sekin 353. Ld Ray 316. Rob. 157. 31.

So a promise to leave promisee a sum of money by Wills. Bull 280. 3 Burr 1278.

And to make y contract binding there is no need of y contingency actually happening within a Year, for y contract is good or not "ab initio" Ld Ray. 316. 317. 3 Burr 1281.

This clause then extends only to contracts wh according to their express terms are not to be performed within a Year. 3 Burr 1281. Pea Evi 214.

And even as to them tis held in Connt, yt when y promise is made upon a contingency and accruing condition, tis good tho be Parol, if to be performed within a Year from y time when y consid^n is complete. As Parol promise to pay for boarding one, child. 2. yrs. Holden Good. 1. Root 89. Ld Lure.

Sixth Clause of contract, contemplated by y Stat. seems not to require a distinct consideration, nor yt y consid^n need not appear in Writing - y promise only being required to be in Writing. 6 East 307. 32

Rules applying to all or several of y diff^t Contracts, contemplated by y Stat. The construction is y same in Eq as at Law. The remedy or relief may be diff^nt. 1. B R. 600. 3 B&C 430. 1. 1. Ton 16. 22. Intention of y Legislature governs both. Construction is merely y means of discovering yt Intent. 1. Pow 370.

Agreement or Note or Memorandum in Writing? What?

Any writing I suppose wh is intended to furnish evi, is an agreement or Note or Memorandum, within y Stat. Therefore a letter written by one party is a note &c

1 Bern 201. 2 D. 322. 4 Sw 287. 8. 1 Jac & W. 179. Rob. 105. 6. 2 Br Ch 32. 3 Ves 318.

93. A Letter to one's own Agent of stating y Terms of an Agreement made, holden Gates. 3 Atk 374 503. 1 Rob 121. But it must distinctly furnish y terms of y agreement. Seems not binding.

But y terms may be made certain by reference in y written agreement, to other Document or extrinsic Facts. As agreement to convey for y same price yt P.J gave. Or an agreement to convey the same quantity of land, wh was by P.J by a certain deed. 3 Br Ch 315. Rob. 10.

1 Ber Jn 330. 2. B. & C. 238.

It must also appear yt y other party accepted y Terms and acted upon y offer. 1. Jac & W. 179. 2. Plow. 65. 1. Sw 287. 8. 9. Mod. 3. Seems there is no agreement.

When y writing refers to something extrinsic wh is to make it certain, if y thing is not made sufficiently certain by y thing referred to itself, no parol evi is admissible to make it more so. Rob 108. n. 1. Ber Jn 326.

As referred to a deed wh don't ascertain y subject or thing, agreement too uncertain. An advertisement printed. Post 98. by one of y parties and containing y terms is a sufficient note. 1. Ch. & Ch. 3 Burn 1921.

94 And y consid^n as well as y bargain must appear in writing. "ante 60" This agreement is required in y to be in writing. 5 East 10. Rob 116. 207. & 6 East 307. Seems as to Contracts for y Sale of goods of value (under y Eng Stat) note or memorandum

of y bargain only is mentioned. 6 East 309. 3. Rob. 117.
Agreement is not mentioned – Bargain construed as a promise. (Semble)

An instrument intended as a deed and having to parate as such, from y omission of some requisite or by a change in y relative situation of y parties, may be considered in Equity as an agreement or as Evi of an agreement.
As bond to one intended like to convey Land to me. 2. 3 Atk 42. Fos. 169. or 23.

Being a "debitum in presenti" tho a bond avoided by y marriage of an obligor in form of a deed but not in respect as our Ct Law requires.
An Agreement imports y bonity of assent of both parties. Hence a mere writing in a Stewards book, is no Evi of an agreement between Land Lord and Tenant. 1. Atk 497. Rob. 169.

75. Signing. What?
Not only a subscription in usual form but y name of y party to be bound written by himself or an authorized Agent, in any part of y Instrument, if intended to give authenticity to it, is a valid signing.
As A & B agree with C & D. to sell them B's Lease & not subscribed – tho valid. "Devises 17" Str 333. 1. Vesey 118.
2. Eq Ca. 32. 1. Ves 6. 3 Atk. 378. 1. Pow 283. 4. 1 Sanb – 167.
3 Ler. 1. 86. 9 Ric. Ca 249. 2. B & F. 238. 1. Ch Ca. 195.

Secus when y name written in y body of y Instrument is not intended to give authenticity to it. As A having agreed to lease to B by Part, wrote instructions for drawing y lease in these words. y lease to be ~~some~~ renewed. &c to pay taxes. This is no signing by A. His name was inserted merely to explain y stipulations – not to authenticate y Agreement.
1. 2 Wm 771. 1 Sanb. 166.7. 1. Pow. 285. Rob. 121.

Form not in ye form of an instrument, was not intended as such.

It was formerly subscribed, (it seems) yt one party making alterations with his own hand in ye draught of ye Agreement was a sufficient signing. 1. Vern 221. S. 1 Ch. Ca 166. S. But yt opinion is overruled. 1. P. W. 770.

1 Ch. 1. Ch. Ca. 166. 1. Pow 284.

But only signature as a subscribing witness, he knowing ye contents is a sufficient signing. to bind him to any stipulation, recited in the writing on his part. As when marriage articles, recited yt ye mother of one of ye parties, had agreed to advance 1000 £. as a portion. and subscribed by her as a witness, she was holden bound, tho' in not in form a party.

1. Mich 318. 1 Ves. 6.

The subscribing witness in such case, may be considered as having adopted ye agreement as his. Rob 123. 4. or at any rate it may be considered as a Note or Memorandum.

Who must sign?

Sufficient if ye party on whom ye claim is made has signed, if there is Evidence of ye agreement of ye other. As if A draws an agreement and procures B to sign it. tho' he himself does not, B is bound. 1. Madd Eq 334. S. Newland C. 171. 155. 1. Eqty Ca 20.

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Eqty Ca. 2. Do 32. 2. Vern. 373. 1. Pow. 286. 1. Bro Chy 564 9. Ves Ch. 337.

Rob. 115. n. 124.

In ye last case he said yt A also is bound, for procuring B to sign, made (B's) subscription a signing authorized by A. and a signing by ye procurement of one party is equivalent to a signing by his agent. 1 Pow 287. 1. Eq. Ca. 21. 10. 2. Ch. Ca 04.

(Rob 117. n 124. Sugden. Newl. 64. 155. 171. 1. Coll and Lefroy 20.

Here. Was it not a signing in A name, and does not import to be a signing for him.

At any rate, if ye party not signing signed a

bill for specific performance. he is bound. it seems for he thus recognises & virtually affirms ye Agreement as to himself. 1. Ves. 42. Rob 124.

Doubtless yt it would not in such case serve vs Def. but upon condition of performance. ye Pltff

So auctioneer subscribing without bidder's name to ye condition of ye Sale is said to be sufficient signing for both parties. In thus subscribing he is said to act as agent for both. 1. Bos & P. 599. Bull N P. 280. 3 Burr 1921.

1. B & P 306. 1. Ves Jr. 344. 9 L. T. — 8. 1 yr y 1 Sc i y y — ry 1 1 w. r \ 8

Aliter, when ye subscribing matter is an interest in land. Here ye agreement or some note must be in writing wh ye subscription by an auctioneer is held to be. 8 T R 157. The case cited was of ye second crop of land

It has been doubted an sales by public auction are contemplated at all. by ye Stat, The transaction being public, and therefore no danger of perjury. Bull 280. 3. Burr 1921. 9 B & P 600

But it dont appear by any direct authority or by any reasonable rule of construction yt such Sales stand on a footing different from others.

A printed name may be a sufficient signature ante 94. Rob. 124. 2. Bet P. 238. for ye name is printed by his procurement and printed or rather delivered as his signature.

It is not necessary yt ye authority of Agent signing for his principle shd be in writing. The St requires yt only ye agreement be in writing, signed &c. "Deed 36" 3 Ross. 429. 3. Bes & Sm 251.

Not necessary that ye identical contract shd be signed. Satis if acknowledged by a writing yt is signed. As Letter to his own Agent - stating ye terms

y terms of an agreement already made. Thus a ⁜
memorandum in writing of y Agent.

1 P Wms 770. Rob. 121. The bare writing an agreement with y party's own hand, does not dispense with y necessity of signing.
(3. Br Chy 318. Rob. 121. 3 Atk. 518. These belong above) ⁜

100. Of the Consid^n necessary to support a Contract.
A contract is an agreement upon sufficient consideration to do or not to do a particular thing. 2 Bl 442.
According to yd consid^n is of y essence of y contract.

Consid^n is y material cause of a contract, yt in consid^n or on account of wh. each party is induced to give his assent. 1 Pow 330. 2. Bl 443. 4.

There are 2 kinds. Good and valuable. "Deed 18"
1. a good consideration is yt of kindred or natural affection between near relations. 2. Bl 29, 444.
3 Co 83. 1 Pow 361. 1. Vern 427. 1. Tunl. 33.

Such a consid^n in contract executed is valid as between y parties. As grant by deed from father to son. in consid^n of natural affection.
But as vs Creditors and Purchasers generally deemed fraudulent, and set aside 2. Bl. 29, 297.

101. In a executory contract on such consid^n may be enforced in Chy. in many cases. 1. Pow 361. 5. 1 Vern 427
2 A P W^ms 176. 2. Do. 176.

2. Valuable – this consists in something of a pecuniary value. as money. goods. labour. marriage. Lands.
2. Bl. 297. 3 Co 83.
Indemnity to promisee for becoming surety &c,
1 Burr 482, 482.
Contracts on valuable consid^n may be made in either of 4. ways. 1. Pow 338.5. 2. Bl. 444.5.

I By stipulating Mus. "do ut des" as on Loan, on Bond or Promise. Case on contract. where to be implied to pay. &c.

2. Facio ut Facias. as where labour or service is to be performed on both sides. or forbearance on one side and some act on the other. or mutual forbearance

3. Facio ut Des. as an act to be performed for reward.

4. Ff. Do ut Facias. the counterpart of the last, or the last inverted. as giving or agreeing to give some thing for an act to be done. 2. Bl. 444. 5. 1. Pors 335. 6.

Contracts under the present view are devided into 2. kinds. 1. Special. 2. Simples 7. T. R. 351. n.

A Special contract is one which is entered into and evidenced by Specialty 1st. by deed or writing sealed. 2. Bl. 465. 295. Co Litt 171.

A Simple contract is one by parol or one reduced to writing but not sealed

A contract in writing, but not sealed, and a Parol contract are upon the same footing in point of Solemnity. Rob. J. C. 109. 1. T. R. 351. n. 2 Bl. 465. 6.

An Simple, indeed a writing not sealed, is a mere Ex of a parol contract.

In Commt written instrument, contain. J. w. prest a promise or contract, an sealed or not are generally reckon as Specialty. And the Ency Law relating to Specialties, applies generally. tis said, here to written contracts - not Sealed as well as those Sealed. - if they contain an Express promise or covenant. 1. Rev. 373. ante 60. 1 C. (Ainf. Co 1812) Qd where as to the extent of the section.

Its clear that an executory agreement by Parol and

binding without a consideration.
1. Pow 335. n. 2. Bl. 445. Salk 123. Plow 302. Day Eyre 30.
6. 336. Sir Ray. 303. 5 T R. 143. 1. Ton Ld. 326. 332.
Tis a "nudum pactum and ex nudo pacto non oritur actio" As a promise to give me 100 Dolls or to labour without reward.

But if owner of goods delivered them to another on Letter promise to carry or restore Cabaw upon there delivery is a Suffict consid^n & promise is binding.
"Bail 82. 81."

But by Wilmot J. a contract in writing is good, without consid^n at C Law. 3. Burr 1670. 2. Bl. 440.
This proposition is too broad. 1. Pow. 333. 42. 2. Ld. 242.
as to y case but by Bl. of a promissory note.
2. Bl 440" it is to be observed yt as between y original parties. an actual consid^n is necessary and must be proved. 1. Pow 341. Ch. Bills 51. 2. 9. 7 T R. 351. n. Doug 514. 7 T R. 121. Hyd 155. 3 T R. 421.
757. 1. Ton Ld. 335. 4 Mod 242. Sir 674. Bulk 274.
Rol. f. c. 39. 100. Tho' after a negotiable note is negotiated, promisor cannot in Gen aver want of consid^n because a 3 person becomes y holder and y Law Merchant governs. 1. Pow 341. 2 T R 71. 1. Ton Ld. 335.

104 Secus a fraud on 3^d person.

But at C Law merely reducing a contract to writing dont supercede y necessity of consid^n and as I conceive yt in strictness and in the judgment of Law. a consid^n is necessary to y validity of a Sealed Instrumt. or Specialty. Tho' 1st Pltf need not prove a consid^n and 2^d Def cannot at Law. aver y want of it. For 1st from y solemnity of y Instrumt, a consid^n is presumed. Every man is estopped to deny his own deed. 1. Pow 333. Plow 308. 3 Burr 163. 1. Ton Ld. 334. 2. Bl 440. 209.
and therefore Deft ant bound to prove one — 2^d

2d. A consideration being implied or presumed if any right or interest, a mere contract in deed with cannot be. Doe 3 Ad 2 B 265 Doe 484. 1 Ch R 334. Bad 2." * It is adopted to any it. 2d Ray 729.

Consideration of consideration appears on face of the Deed. So it seems. So considered "Semble" 2 Ch 5 4 Burr 2 2. 3 Ch 136. 7. Ind 438 1 Bos 369. 7. Co 40 2. Atkins 52. Result get on principle, a consideration deem necessary to validity of a Specialty when of contract or Executory, but yet it is binding unless of want of consideration appears in of Instrument. For in some other instrument of equal dignity, this varied of of contract. See Rob 55.

Q. G. So consideration was holden necessary on all hand, in Court in Pettiward v Burn. It of Exon 1 Co. r 4. action on note a Covenant Specialty bond given at of same time declaring consideration. Action broken to be because there was total consideration discovered. 1. Bos. 4. 2. But on voluntary contracts under seal only nominal damages are received at Law. This applies of contract obligatory. But is of want of consideration discovered to appear in of Instrument? What is of meaning? (Cases in Pe Ch 45 as to relief on voluntary bonds in Equity) 3 Ch 222. 5 54. 2 P Wm 245. Rob Fe 460. 3. Pr Ch. 12.

R. P. G. Probably yet on point of enquiry of want of consideration may be proved, to mitigate damages, not to affect of right of action. If of want of consideration does not appear. How can it be proved? If it does appear out of contract, void or void in Solo. Rob 7.
* It cannot be proved. Ex Rhodes. 3 Ch B 418

The law yet a consideration is necessary to every contract applies broadly, in its full extent to Executory contract only. A contract made by of delivery of of subject is good without consideration, as between of Bailor - as a Gift. 1. Due 238. Dry 2. 1. Wms 5th. 3 Ch 550. Or of contract

being executed by ye parties, ye same were not sealed & delivered & ye agreement of executing
& &c. Held in consideration of consid^n expressed in deed of Lease is conclusive for between ye parties
& ye manner & ye consid^n recognition only as to amt
and receipt of 1. Co 40. 11. Rich 47. B. & C
Cow reported & Cradelebrymm dit in not for ye
order, Consid^n being acknowledged to be received

A consid^n may arise, it has been said, in only one
of 2 ways. I. from something advantageous to ye party
promising or undertaking or
2. from something disadvantageous to ye party to whom
promise is made. Post 108. Lee observed that the Case is two
narrow. 1 Lev 302. 1 Ventr 330. 1 Com 144. Pow 280-4.

First from something advantageous to ye Promissor.
As in consid^n of my selling and delivering goods to
B. & C. in day. to provide to pay hereafter. Here ye consid^n
is something advantageous to him.

The quantum of consid^n is immaterial, The Law doth
in ye instance regard proportions. Sales if there are
value. as a peppercorn. 2. Ven 213. 2. Pow 152. 1 Mod
230. 2. Ver 518. Cases of a nutt because of no Value.
Idle and insignificant consid^ns are deemed sufficient
consid^ns in Law. 1. Pow 353. Cro J. 54. 2. Rob 23. Cro E. 206.
But any thing however trifling to be done by him in
whose favour ye agreement is made, is a sufficient consid^n.
As if A Leases to B. B assigns to C. Rent became due,
C promises to pay it. if A will show him ye Lease.
Here showing ye Lease is sufficient and gives A an action
on ye promise. 1. Pow 343. Cro Eliz 67. 150. Cro Ch 75. Dy 272.

The mere relation of husband and servant is a sufficient
consideration. for a promise. as a clear stating Def^t to be
servant, and in consid^n of wh. he promised to carry away

from y Sam. Trans. Pc. 5 T.R. 373.

Second. from something disadvantageous to him in whose favour &c. as if having a bond vs B. delivered it up to be cancelled &c. on Ds promising to pay y contents.
Cro J. 342. Cro Eliz 74.5. 745. 849. 881. Cowp 128. 1. Ros 344.8.

As a consequence of y General Rule as to y 2. modes in wh y consideration may arise, tis also a general rule yt a contract unit supported by a consid^n altogether past and executed. As in consid^n of one's having bailed my Servant, or discharged me of a Trespass or built me a house &c. I promise to pay. This ant. binding. There is one subsisting consid^n disadvantageous accruing to latter in consequence of y Promise. For y promise ant y preceding cause of y consid^n.
Plow S. 302. Pow 348. Cro Eliz 885. 442.
1. Rolle 11. Cob D. 87. 95.

But where a part of y consid^n be past and executed yet if a part is subsisting, y contract may be good. As Lessor in consid^n yt Lessee had occupied and paid y rent, promised to save y latter harmless in future. This is good. For y occupation and rent paid were past. yet y Lessee was to continue in possession and pay future rent. * 18. promised to Guarantee his title in future. 2. Bulst 73. Cro Eliz 94. Cro Ch 489. 3 Salk 96. 1 Ros 349. 350.

The general rule in page 10. is too narrow Cowper. 294. and y rule yt a past consid^n will not support a contract. is now somewhat relaxed. For 933. 3 Burr 1671. 2.

Thus a contract on consid^n past and executed, is good. if there was a previous legal duty in Promisor. As if one in consid^n of previous indebtedness, which barred by St of Lim^tns promised to pay, tis good. So where one in consid^n of Plff having burned his
1 Ros 350.1. 1 Leon 198. Say 260. Cro Eliz 138. 3 Burr 1671. 2.

child. * 1 Bro 43. Cur to make ye duty of parents to bury their children.

So where there was a moral obligation on Promissor. This is a suffict considn. Promise by overseers to pay for medicine before furnished to a pauper.
Say 259. Bull. 251. Pla Cri 213. ante 67.) 1 Com b. 336. J. R. 259. 2 P.R. 445. 1. Pow 351. Cro 290. 4. Esp 95. Bull 147.

So a considn past will support a contract, if ye considn accrue at ye request of ye Promissor. for ye
6 East 506. contract thus subsequent couples itself with ye previous request. by relation and ergo operates as if made at ye time of ye request. As promise to pay in considn yt P.J. at my request has bailed my Servant. 2. Vent 268. 3 Salk 96. Rob. 165. Cro Ch. 409. Cro J. 18. Cro Eliz 42. 252. Esp 8. 95. 1. Pow. C. 85 352.

It has been holden, yt a mere stranger to a meritorious act, done by another cannot support an action in his own name. on a contract founded upon it, for he does nothing advantageous to himself. He is a stranger to ye considn. As a in considn yt B. will account him of a Freehass., promise B to pay
* £ 100 £ C, to said, cannot sue upon ye promise. 8 JR 330. Cro J. 587. 1. Pow C. 343. 1. Vent. 6 Chitty B 220. 2 Roll 441.

* Ther rule seems now to be confined to deed. "in ye parties" 3 J. B. et F. 148. n. 3 Sw. 139. Carth 77. Cro Ch. 729. Yelv. 23. 1. Lev. 235. 3 Lev 139.
But in ye case of Parol agreemts, it seems settled by ye later authority. yt 3d persons may maintain ye
Sow 443. action. 3 X B et P. 148. n. 3 Sw 139. 1. Do. 101. 2.
Co. 30. 1. John. 140. 2. Str 290. Cumb. 219. 8. Mod 17. he is to be considered as adopting and ratifying

y contract by his subsequent agent.

III. In such cases y promise shd be laid as having been made to y Plff and proof of a promise to another for his benefit will support y declaration — Lembe. 1. B. et P. 101.

It has always been agreed yt a consid^n moving from one will support a promise in favour of another who is nearly related to him. As promise to A in consid^n yt he would perform a contract, to pay his daughter. 1 Vent 318. 32. 2. Lev. 210. Raym 302. 1. Pow. 353.

But it appears from y foregoing Rules, yt no such relation is now necessary, and yt y promise is good in favour of a Stranger.

When forbearance of a Suit is y consid^n, there are 2. Rules.

First. It must be either general. ie. perpetual, or for a certain fixed period.

2d It must be an action in wh y promisor is person deemed to be liable or chargeable, or at least, in wh there a colourable liability on his part. 1. Pow 354. 3. Bro C 200. Cro E. 95. 1. Ego promise to pay a debt in consid^n yt Pltff wd abstain from suing (no time being limited and y forbearance not expressed to be perpetual) is not good. 1. Pow 353. 4. Cro Eliz 6. 405. promise might die y next day. But a promise to forbear a year or a reasonable time is a good consid^n. It are to Judge what is a reasonable time. Ried Cop. 85. Hutton 108. 2 68. Cro D. 95.

Second. promise by another to pay a debt due from her son. if Pltff wd forbear to sue her, and obligatory. There is no consid^n. The was not liable. forbearance is no favour to her. The no disadvantage to Promisee 1. Pow 354. 5. Hard. B. 3 Lath 95. and there is no moral obligation on her to pay —

So if one is arrested on mesne process and arrests on consid^n of no release, promises to pay, we ought to [illegible]. There is no consideration. 3 Co. 1 Pow. 350. p. 1 & 2 & 3 Hard 73. 355. 6. The reliance is only from future forbearance.

So a promise by a to pay B's debt if the creditor will accept, & as his pay master I will forbear to sue for it for 6 mths. is not good even at C. Law. for he might sue B immediately. Edge no consideration to Creditor. 1. Pow. 356. Hard 73.

But a promise in consid^n of forbearing a suit is good, if there is a colourable ground for the suit. As Infant having bought silk and velvet, dies. This Court in consid^n of forbearance promised to pay. This is good at C. Law. for here was a colour, or a suit. The very Cases 1. Pow 356. Lack 142. Dy 272.

Lack 142 Dier 273. 2.

113.

Where a promise is in consid^n of forbearance of a debt originally accruing to the promisor himself, the moral cause of action ought to be enquired into. It is acknowledge by the promise. 1 Pow 357. But could hold if it did appear in the declar^n that the suit for bone was groundless. Pow 358. * The rule Pl. Mank. must be confined to cases in wh for ought there appears, by the terms of the contract, there may have been a good cause of action.

Ld Ray 910. 19. 20.

The mere act of entrusting, bargaining with another, or an undertaking to do something respecting it, is a valid consid^n. As delivery of money to be delivered over to another without reward. 1 Bulstr 15"

Cro J. 667. 5 T. R. 143. 1. Pow 364. Salk. 26. 3 Do 11. Com R. 133.

The preservation of the honour and peace of a family have been holden valid, in Eqy. As agreement between father, son and natural child to prevent disputes. 1. Pow 302. 1. Atk 3.

So the compromise of a doubtful right has been holden

sufficient in Ex. 1. Pow 363. 1. Salk 16. 1 Bem. 4. 2. Vent 353. 2. Ves. 284. "ante 17"

not necessary in contracts yt ye consid^n shd be expressed in direct terms, as a consid^n. Sates if one can be collected out of ye whole agreement. 1. Pow 368. 1 Ves 450. As agreement for settling boundaries.

But if an express consid^n appears on ye face of ye contract, ye express opinion is yt no other can be implied. "Deed 21" 7. Co 40. 1. Pow 368.

Contracts when distinguished with respect to ye form of their consid^n may be divided into 3. kinds. Doug. 665.

1st when yt wh is stipulated on one side, is in consid^n of performance of what is stipulated on ye other. Here ye consid^ns are termed Mutual.

As if agrees to pay B. for doing a certain act. Here ye doing of ye act by B. is a condition precedent to his right to ye payment. 3 Salk 95. 7. Co 10. 12 Mod 460. 1. Saund. 380. 1 Rob. 106. 1. NP 240 n. 1. Hen Bl 274.

If he sues for ye price he must aver performance, 7 TR. 130. or what is equivalent to it, a tender or yt he has been prevented by Def. "Pleads 20" Tender 1 TR. 638. 645. Doug. 259. Ld Ray. 686.

or as ye case may be yt he was at ye place ready to perform and yt Def was absent, and yt he was thus prevented from performing. "Post 137" 114.

concurrent.

2.^d When performance on both sides is to be concurrent, there neither can compel ye other to perform till he has, till he has performed his part, or done what is deemed equivalent. As offered, or is at ye place appointed ready, ye other party being absent.

As promise to deliver B. a load of wheat on such day for such a price 2. NR 240. C. & P. Saund 320. C. 1 East 203. 6 B. 29.

6. TR 366. 7. Do 125. 4 Do. 731. 1. HC Bl. 303.

If a place is appointed for performance, the vendee at plff. now here and Def absent. No tender is necessary, to entitle Plff to recover.

Doug. 688. Salk 113. 1. 7 TR. 125. Str 548.

If Def was to perform on request, the vendee, at g Plff. not ready and requested and Def refused.

1. East 203.

115. If then g agreement is g one shall do an act, for doing wh g other shall pay, g doing is precedent. But if according to g terms of g contract, g money is to be paid on a day wh is to arrive, or before g act can be performed, g doing of g act is not a condition precedent. As promise to pay such a sum for (yrs labour or for building) a thing g money to be paid in 10. days. (here indeed g payment may be a condition precedent.

1. Saun. 320. a. 1. Sm Ld. 381. 8. Mod 42. 1. Pow. 358.
2. HC Bl. 387. 7. TR. 130. 6. Do. 7. 52. 752.

So it is in g last case, 1E. when a day is fixed for payment, no time is fixed for payment on g other side, 1. Saunds 320. a. 2. Str R 233. In both cases if g rent ant paid at g time appointed for payment, g party promising is liable on the other hand performed or not.

But if g day appointed for payment is at arrive after g time fixed for doing g act. performance of g act is a condition precedent and must be averred in an action for g money.

Mutual Promises Independent.

But when g promises are mutual and independent

116. 1E. when g promise on each side is g consideration of g promise on g other, performance ant a condition

precedent on either side. Either may sue without averring performance. Doug 665. 1. Pow 369. 00. 1. Bent 177. 214
Hob. 88. 1 Lev 293. 1 Salk. 24. 5 Mod 411.

Secus in Equity here Pltf must aver performance, or readiness to perform. The y contracts are mutual. Secus Equity won't interpose. 1. Ionb 383. 2 Freman 35.
7 Pb Pr 84.
Its interposition being discretionary, he who seeks Equity must do Equity. The Ct will interpose on ye cond.
Dependent. Promises.
If y agreement is in ye form. P promises to pay 100 Doll. for transfering stock to me. Be converso. y promises are not mutual and neither of y m can compel performance. till he has performed. 2 Pb Re 1312.
12 Mod 503 Salk 112. Holt 663. 1. Ionb. 382. 4 T Rb 701. 8 Do. 372.5

Where y contract goes to one part of y consid. on both sides. If a breach of it may be sued for in damages, tis independent. 1. Saun 320. Sure will lie, in Pltf has performed in part.

Independent

The question on promises are mutual or dependant is to be determined by y meaning and understanding of y parties. to be collected from y spirit of y agreement and y nature of y contract &c. from y order from wh y intent requires performance. 1. Str 645. 7 Do 130. 6 Do 579. 608.
2. N R 240. a. Doug 665. 1 Saund 320. a. n. 8 Do 373.

Where y promises are mutual &c. tis no bar to y action yt y pltf hath performed his part. Doug 665.
2. Pb R. 1312. 1. Ionb. 392. 3 Lev. 41. 1. Sh. 16. Coup 595.
Each may have a cause of action vs y other at y same time.
The Eng Cts have ~~banished~~ been disinclined of late considering

of promises Independent. 8 MR 37. 4 Do 761. Willes 395.
1. East 619.

Mutual promises must both be binding or neither
118 will be so. If y contract must be of such a nature
and in such terms as will bind both sides.
* Note are not y terms of y Plaintiff's letter sufficient?
for a voidable undertaking or agreement by an infant
wch tho' a good one. will not bind.
And both must be made at y same time - Second
they are "Mutua Pacta" 1. Ros 301. Salk 24. Cro. 88.
. tho' they of such a nature as may bind both
if not illegal or void. on either side, supported by a
promise made to him by a deed will not.

118. 4th & Last. fraud in y consideration of a contract by
a specialty does not in general vitiate it. as in y quantity
or value of y consid^n - as bond for y price of an
unsound horse, tho' fraud in y execution does.
Assent wanted in y second case, not in y first.
2 Bl 304. 11 Co 27. 2. Lev 422. 2 Do 3.9.
3.d. y. and yet to said, yt fraud avoids every kind of
act. 1 Burr 385. 4 Cann. 233. 5 Ibid 200.
Wms 285. 3. Co 77. How is yts to be understood?
An deed falsely read. Wrong instrument substituted
by artifice. Case of the Mill man. b. 88. Ibid.

120. But they will relieve in contract of every kind for fraud
in y consid^n 2. Ros 145. 2 P Wms 303. 3 Ford 200.
At Law y party defrauded must resort to his personal
action for y fraud. and such appears to have been y general
rule in relation to Parol contracts executory, without deed -
As in sales of goods under false representation, of, concerning

But yt rule is in y last case much relaxed by late
Pea Dig 233. 4 Bl 95. decisions - see Cro 2 Bafs in y case "of" 1. Lamb 120.
Ad: 184. 8. Wms John 453. Does it not hold at all

in ye case of simple Contracts.
C J P. In one case however, ye Ct of B R seems to have considered Fraud in ye consid^n of a contract, a good defence. The circumstances of yt case were peculiar Perhaps other points influenced ye decision. 3 T R 488.

But our Cts have holden yt a total fraud in ye consid^n of a note or bond I.E. when ye promisor has received, is to receive nothing, is a good defence at Law. 1. Bost 58. 300. W Georgia Land frauds. Therefore in such cases relief cannot be had in Equity if ye Defendant is in suit at Law.

Secus when ye fraud is partial – here ye relief is in Eqty. for Cts of Law must give Judgmt for ye whole amt or for Def they cannot apportion. 121

But hate our rule. Wh ye fraud is total yet if ye obligation ant in suit, or if all ye obligation ant in suit) relief may be had in Equity. Secus if promisor wd remain in Jeopardy till promisee wd bring a suit at Law.

Interpretation of Contracts. 122.

ye Object of construing contracts is to ascertain ye intent of ye parties. 1. Pow 370.
And ye contract however expressed cannot be carried beyond yt Intention. 1. Pow 370.1.
Thus if A yt ni he pays 10 Dolls per annum, B may distrein for it on B's manor – A writ of annuity wont lie for it. because there is no grant of an annuity or rent. 1. Pow 371. Co Litt 140.7.

But tis a good rentcharge for wh B may distrein for ye manor is charged w.th ye distress

Contracts are to be carried to ye full extent intended

if ye word can be so construed - as to effect it.
As First. contract to raise money out of ye profits of an Estate, comes in Equity a right to sell if ye sum cannot otherwise be raised within ye time.
1. Pow 372.

23. Words are to be understood kata to their ordinary and most known signification, ni there are decisive reasons to ye contrary. (Municipal Law) Popham 55. Cro Ch. 386. 2 Ro. Ab. 213. 1. Pow 373. to 76. Plow 109.

Thus if A agrees for 20 ban. of ale. he ant to hold ye barrels after ye ale is out. 1. Pow. 374. Plow. 86.
Seeing of ~~bbd~~ an agreement for a hhd of wine, vendee has ye hhd. (Pbd) Such ye understanding of ye parties in such cases. such ye usage.
So a Lease for 12. mths is for 48. weeks only. 12. Lunar mths. but a lease for a twelve mth is for an entire year. So understood by ye Parties.
Bxs of Lic. 85. 1. Pow 375. 2 Ho. C. 141. 5 Co 61.

24. Words expressive of quantity are construed at ye place as they are here understood. - where spoken or bed - As Pounds. bushels. 1. Pow 376. Shep Pcit. 172. Quere? If to be delivered at another place -?

But if money is made payable by contract, at a place named its denominations are to be understood kata their import, where it is made payable. As contract in London to pay 100. Dole in Dublin. The sum to be paid is 100 hundred. Irish Currency. 2 P. Wm 88. 690. 1 Pow 407.

If ye language is ambiguous, ye intent may be inferred from ye subject. - ye object. & ye circumstances.
1 Pow 376. 7.

The Subject. First. From ye subject. A Covenant for quiet enjoyment extends not to Tortious Entries. For ye intention as inseperable

rom ye subject is merely warrantee to his Title.
Cro Eliz 212. 13. Cro J. 425. Sty 403 — 4 TRe. 619. 3 Do. 584.
Cro D. 273. 381. 4 Co. 80. 8 Do. 91. B.

Grant of Common out of all my manors. Grantee has 125
Common only in commonable Parts. or places. not in
Grantors garden. 1. Pow 377.

So grant of all ye trees growing on my farm.
dont include Fruit trees growing in my Garden.
or orchard. if there are other trees growing on ye Land
1. Pow 378.

So from necessity, ut res magis valeat pe. an from Necesity
instrument may be construed and take effect. as if it
were in form and structure an Instrument of a different
nature. or Species. As Feoffmt or grant by Pt Tenant.
to his companion operates as a release. a Covenant
never to sue a debtor. as an acquittance.
3 Salk 298. 15 Re. 446. 2 Saund 96. Cro Eliz 352. Salk 574. Ray 187.

Second From ye effects. Thus if construing a contract
hata to ye ordinary meaning of ye word, will render
it ineffectual or frivolous. a diffnt sense may be put
upon ym. As Rice 1000 £ wh I never promise to pay.
Cro Eliz 205. Bent 202. 3 Leon 211. 1. Pow 382. 2 Bl 155. Nov 14. Pow 382.
As where words of condition are used in Limn of
Estates. See Estates. 2 Bl 155.

So if an annuity is granted for instructing ye son. or 120.
other services to be done, ye grant is conditional,
tho not so expressed, for Secus ye Grantor wd be
with remedy. 1. Pow 283. Nov. 14.

From. Circumstances 3d The circumstances attending ye 8
transaction may be considered to explain a contract.
wh might Secus be doubtful or be construed as
ye Intention of ye Parties. 1 Pow 335.
Thus if A grant an annuity to B. "pro concilio impendendo"

it shall be intended to mean B's professional counsel, Counsel in Law. if a Lawyer. In P's hence, if a doctor.
1. Pow 385.

If one having goods in his own right and as Ex^r grants all his goods, y grant is construed to include his own only. 3 Mod 285. 278. 1. Pow 388. Cro Chr 705.

Sth P. 535. 37.

12. So when there is a recital of a particular claim in a release followed by General words of release, y latter are qualified, are restrained by y former. 4 Bac. 289. Feb. 74. 3 Mod 277. Ld Ray. 663. Cro J. 170. Cro 243. Ld Ray 235 1. Lev 39.

If it had a judgment on a bond vs B. for 1000 £. B gave A. a legacy of 5 pounds and dies. A. on receiving y 5 pounds, executes to B's Ex^r a release acknowledging y receipt of y Legacy, and concluding with y General words, & release all demands vs as Ex^r. The debt not discharged. 1. Pow 391. 2. Eqty Ca. a. 170. 4 Bac 290. 3 Mod 277. 2 Lev 268. Carth 119. Sybert 74. Ld Ray 663.

Seem (semble) when y receipt of a particular Loan is acknowledged & no particular claim recited. As £ 5. in bill. 1 Show. 155. Carth 119.

13. But if after y application of these rules, y intention remains dubious, y contract is generally to be construed vs y party bound. as Grantor. Covenantor. The words are his. he shd have explained himself.

Exception when there is an ambiguity in y construct^n of a penal bond, construction is in favour of Obligor. As y condition is intended for his benefit & to relieve him from a penalty, we will favoured —

Hence if one is bound in a penal bond conditioned to pay money at such a feast and there are 2 feasts

in ye year of yt name. ye money is payable at ye Last not at ye first. 1. Pow 397. 8. 8 Dyer 17. a. Seems of a Covenant I conclude.

So it is holden, if one is bound in a bond to make a sates and Lawful Estate in Land by ye advice of a. b. and he makes an estate hata A B's advice, Tho sates and Lawful or not, ye Penalty is saved. 1. Pow 398. 5 Co 23. C. Pea 775. Quere wd not Equity decree a sates assurance? 1. Pow 450. 1. Cofy Cs. 129. a. 18. 8.

Exception also, when ye abbliection of ye Gen. Rule (last page) will occasion an injury to a 3rd person. Thus if Tenant in Tail makes a loan for life, not expressing for whose life, ye life of ye Lessor shall be intended — Seems ye Issue or Reversioner might be injured. 1. Pow 400. Co Litt 42.

Tho if made by Tenant in Fee, ye lease wd be for Lessees life. 1. Pow 400. Co Litt 42.

Subects to these rules ye words are to be construed in ye most comprehensive sense in wh they are generally understood. An Covenant of Warranty by ye claims of all men" is a Warranty by ye claim of all persons. 1. Pow 400.

And an indefinite expression is construed as an Universal one in relation to ye subjects to wh it extends, in there is some manifest reason for restrain ye it. 1. Pow 401.

As Two Ft Tenants make a bill of Sale of all their goods, as well their Several goods as those holden jointly.

So if one reciting yt he owns "divers" horses or horses makes a bill of Sale of ym all, his horses haps. 1 Pow 450. 1. D 97

2 Rol 283. When Legal language is used, tis regularly to be understood according to its Legal acceptation 1 Pow 402. A Limitation to one's heir, as long as he pays such an annual value or sum, extends to all his heirs successively.

Quere ant ye word "heir" in ye case manifestly used as a Term of description — "Real Estate"

So an covenant to satisfy after request and due proof, all embezzlements by Covenantor's apprentice Indeed proof is intended 1C. proof made in an action vs apprentice 1. Pow 455. Hob. 217.

Hob. 217.

131. Contracts are to be construed according to ye General intent appearing in the whole contexts, tho' opposed to particular words or clauses* in ye Instrument or Agreement 1. Pow 403. See *"Devises" A Covenant by Lessor yt he has made no former grant in wh ye lease may be defeated but yt Lessee may enjoy quiet hereinance by him, or any other person. Disturbance by any other person yn Lessor's Grantee is no breach. "Covent Broken" 22"

Cro Eliz 43. 615.

If ye thing stipulated for, is not delivered or done as ye contract requires, its value at ye time fixed for performance is ye rule of damages. 1 Pow 408. 9. 1 Bern 217. 1 Eqty Ca. 221. 2. Burr 1010.

Yor 408.

Except when ye thing has afterwards risen in value. Then ye value at ye time of Trial is ye Rule. Focus ye party claiming not suffer by ye others neglect. 2 East 211. 2 Bern 394. 1. Pow. 409.

after ye time of delivery.

But if afterwards falling in its value, would diminish ye damages and any fluctuation in ye value before ye time appointed, but wh is then past make no difference. Ibid

If several deeds or instruments are made at ye same time between ye same parties, respecting ye same subject, they are also considered as parcel of ye same contract, and are to be taken together, for ye purpose of construction. 1 Pow 410. 2 Vern 518.

An absolute deed, with defeasance seperate, made make a Mortgage.

Annulling, discharging & Waiving Contracts.

Premise. tho ye terms of a contemplated contract are accepted on both sides, ye contract is not consumated, and either party may retract ye offer. "Title Deed. 4."

So if a bidder at auction before ye goods are knocked down to him. 3. T R 148 - 653. he may take "Locus pen" 1. Pow 334. Cb D. 47.

But an offer on one side accepted by ye other, becomes a contract. so yt either by tendering performance according ye terms of ye contract, or agreement, may bind ye other. 2. Bl 447. Cob 41.

Thus if A offers to B. 20 £ for a horse and B. says yt he will take it A by tendering ye money or B. by tending ye horse may close ye contract or rather bind ye other. 2 Pow 63.4. Cob 41.

So if on such an offer accepted earnest is paid. or if a future time is fixed to perform, ye contract is complete and property bound. 2 Bl 447. 8. Stoy 42. 7 HR 64. 1. H Bl 363. 1. Pow 330. 31.

But if on ye offer being made and accepted nothing more is done, IE. if there is no payment or delivery nor earnest. - nor future time appointed and ye parties seperate, there is no contract. ye bargain is waived by both parties. 1. Pow 231. 2 Bl 447. Plow 302. 9. 1. H Bl 363. 2 D 316.

So if A agrees to sell goods to B. if B within a certain time. shall choose to buy y.m. and B within yt time gives notice to A. yt he will take y.m according to A's agreement A aut bound. The agreement must bind both or neither. But by y terms of y first offer. B was at Liberty to accept or refuse, so yt there was then no contract, and if A refuse afterwards there is no new new contract. 3 T.R. 653.

Contra 1 Bos 261. not Law.

But before a right of action has accrued on a simple contract, y parties, may rescind by barely expressing their mutual dissent For there is no consumated right distroyed by it. "assumpsit 59" Mutual assent is withdrawn, before either can make a claim vs y other. Com D. T. Pleas 2. G. 13. Cro Ch 383. 2. Lev 144. Selw. N.P. 136. 1. Bos 412. 1 Mod 259. 12. Do 538.

But after breach it cannot be discharged by agreement without a release by deed, nil there is a new agreement substituted and Executed. 1E. accord and satisfaction.

1 Selw 130. n — Here there is a right in consumated and y question of assent is at an end. 12. Mod 538. 1. Bos 412. 16. Cro Ch. 384. 2 Mod 44. 1. Do. 259.

135. Seems as to y acceptance of a Bill, acceptor may be discharged by Parol after y Bill is payable. Chitt 83.4. ("Bill" 48. Title) (Bill. § 48) Eds D. 47. Doug. 238. 47. Eds D. 47.

This seems to be a positive rule of y Law Mercht.

But an agreement may in Equity be waived by long omission on both sides to execute or claim under it. As an agreement between Land Lord and Tenants to inclose a part of y Common. delayed for 20 yrs. There is a presumed abandonment. 2 Bro P.C. 16. 2 Eqty 20 9 Mod 2.3. 1 Bro 420.21. (2 P.Wms 82 1 Bos 441.

So where there was an agreement between intended husband and Wife, yt the shd have her property, to her seperate use, and she permitted y husband during y whole coverture, to take & receive to himself, she was presumed to have abandoned y Agreement.

But y presumption may be rebutted by proof yt she was satisfied during coverture and yt y husband took y Avails under an engagement to fulfill y agreement. 1. Ath 269. 1. Pow 222.3 130.

And a contract consumated & executed, may be rescinded even by one of y parties only. When there is a processive to yt effect in y original contract itself. As a sells a horse to B. but on an agreement yt B may on a certain event return him so y happening of yt event B may recind and recover y money paid. as had and received. This is a Defensible Contract. 1. Ro. 135. 7. Do. 201. Cowp. 818. Doug 23. 2 Cast 145. 3 Ep 82. 1 Ro. 357.

But Kata Powel, of a contract with B. for property at such a price, as P.J. shall name y parties cannot annul it, because they have empowered a 3d person to perfect it. 1. Pow 415. 16. cites Bac Max. 91. Quere what right has P.J.? This ant Law.

But a contract can be released after as well as before action accrued. 137.
A Release may Express. or Tacit. The former is by regular acquittance by Deed. — y latter by destroying or cancelling y Instrument.
1 Pow 410.

If he who is to be benefitted by ye performance of an ~~Instrument~~ or contract, prevents it from being executed is dissolved. 1. Pow 416. 420. 8 Co 91. 2. Co Litt 206.
1. Pow 265.
Or rather ye other party is discharged, but ye party preventing is still bound to perform his part.
Tis incorrect, to say its dissolved.
And in such case ye party who was to perform is in ye same condition as if he had already performed
As if covenants to build a house, for B. for 100 £.
B prevents him from building, it may recover ye 100 £
8 Co 91. 92. Co Litt 206. Co Elizr 374. 1 Pow 265. 416. 420

So if A makes a Feoffmt to B. with condition, yt it shall be void on its paying 100 £ to B. on a certain day, & on ye day. B. ye feoffee is out of ye realm, so yt it cannot tender. it may recover as if ye money had been paid. 1. Pow 420. Co Litt 210. 2.
Yet will not Equity consider it as Trustee of ye money for B.?

A contract may be annulled by a new contract of a higher nature for ye same thing - a Merger.
As a Simple contract merged in a bond. So in a Judgmt. "assumpsit 33"
Tis ye intention of ye Parties is not to furnish an inferior remedy, but a substitute a higher one.
1 Burr 9. 3 Ear. 284. Bull 155. 2 Co 45. Co Dig 164.
Secus its said of ye bond is given by a Stranger.
1 Pow 423. Margin merger. Dyer. 230. B.
Tis only an additional security "assumpsit" 34.
Not a substitute.

So a bond may be merged by a Judgment recovered upon it. A Judgmt debt being higher than a Bond debt.

"Assumsit 00" And a contract of a given degree cannot be extinguished by a new one of ye same degree. If ye latter as a new contract is no bar to an action on ye former. 1. Pow 424. 1. Burr 9. Cro P. 54, 9. Cro Eliz 54, 54. Ch. Bills 62. The latter cannot merge ye former. But when pleaded by way of record and satisfaction. See ye distinctions.

1 Ved 126 Str 426. 5 East 436. 2 TR 20. 3 East 201.
"Assumsit 60" 5 Co 117.

In yes way may be discharged the original contract.

But where a contract of a lower nature is inserted in one of a higher nature, merely by way of Recital to corroborate it and enlarge ye remedy, tis not merged. As one bails goods by Deed, If takes a deed as Evi of ye contract of Bailment, Detinue lies. One by deed acknowledges ye receipt of money to account. — account lies or action without deed.

Record 79. Assum. 70.

2 Bulst 250. Cro Eliz 544. 1 Pow 425. 218. 223. 1 Roll 118.

Here ye Simple contract ant intended to be turned into a Specialty. The latter is designed only as an additional Security - not as a substituted one and may be used in an action on ye former.

But ye party is subjected, but once.
Account.

Contract by deed cannot be annulled or discharged 140.
by Parol. Co Litt 301

Nor by writing not sealed. Co 44. Cro J. 254. 1 Saun 291. n 1.
2 Mod 86. 576. Yelv 192.

Nor by mere delivering up ye Instrument to Obligor.
if obligee regain ye poss of it.

Even payment or accord and satisfaction "of a bond" is not a discharge. The payment of ye money due upon it, is sufficient. Cro J. 254. Yelv 192. 1. Pow 451. 51. Do. 426. 7. Mod 144.
The distinction appears to relate only to ye form of Pleadings.

So accord &c of ye "damages" accrued on a Covenant is a good discharge for ye damages.
5. Co 43. 44. Cro J. 99. 650 Yelv 125. 1 Pow 447. Cro Eliz 46.

141. When ye right and obligation created by a contract unite in ye same person, ye contract is discharged at Law. 1. Pow 438.
As obligor becomes Exr or adm^r to obligee.
8 Co 130. 1 Salk 300 2. Pow 254. 5. 9. 1 Mod 62. 10 Do. 575.
Contra 1 Day 220. afterward, denied by the S.C. of Comm.
So if obligor marries obligee, ye contract is generally annulled by ye Legal unity of ye parties.
see Husband and Wife. 1 Pow 438. 9. 444.

Secus of a bond made in contemplation of marriage and it be executed or performed after ye determination of ye coverture. Hob 216. Cro J. 571. Salk 235. 1. Ld Ray 545.
5 MR 381.
Contracts may also be discharged by act of ye Legislature. 1. Pow 444. 5. Sal 138. 8 Mod 57.
2. P Wms 218. (Municipal Law Eng) As a Covenant to do an act afterwards prohibited by Statute
(40. 51. Municipal Law)
142. So by act of God. as Lessee covenants to leave all ye timber trees, growing and a tempest blows ye in down. 10 Mod 268. 1. Co 98. Noy 35.

So if A lends a horse to B. to be returned &c and ye horse dies of a disease wch B. ought — Bailee is excused. 1. Pow 447. 8. Palm. 545.

So if A contracts to serve B a year, for a sum to be paid in half yearly instalmts, and B dies after ye first instalmt P before ye last. B's exr. wnt liable for ye last last. 1. Pow 448.

But a contract becoming partially impossible, must be performed be "res" "Mercurial law" 1 Pow. 448. Pow. 184.

So if one is bound in a bond conditioned to convey land by a certain day, and dies before ye day, ye penalty is saved. Wh Equity wills decree a conveyance vs ye heir. 1. Eq Cs. Abr. 16. 8. ante 52

But ye act of a 3d person cannot regularly vary a contracts. Ex. Bond by A to P.S. conditioned yt B shall appear in an action in 8 days notice P that if Judgmt is vs him, A will satisfy it. B appears on 9 days notice. and Judgmt is vs him. A ant. bound to satisfy it. 1. Pow 451. W Jones. 441. 143.

Sho' when a contract is by ye terms of it, to take effect or be varied or annulled by ye act of a 3d person, his act will operate upon it, as provided for in ye agreemt. As contract to buy property at such a price as P.S. shall name. The parties &c are bound by his decision & if he refuses to set a price, ye contract becomes void. 1. Pow. 415. 6.

No 6

Bailments

A bailment is defined to be a delivery of goods by one person to another, upon a contract express or implied, yt they shall be returned to ye Bailor or disposed of according to his direction, when ye purposes for wh they were bailed, is answered.

#

Every Bailment vests a qualified property in ye Bailee.
7 T R 357. Doe Str 129. Jones 112. 1. Yelv. 172.

The party delivering ye goods is called ye Bailor.
The persons to whom ye goods are delivered denominated ye Bailee. Ye transaction is called a bailment. Ld Co. in Co Litt or in Southcote case takes a wrong distinction (Jones 3. 48. 2. Bl 451. Cro Eliz 622. 12. Mod 482. #
1 Bem. 268.

In ye delivery of goods by one party to another in ye manner, ye Law presumes a contract viz yt ye bailee shall restore ym. to ye Bailor, whenever he shall demand them, or yt he shall answer with ye goods ye expressed terms of ye contract. 2. Bl 451. Lords 348.

Bailment tho a species of contract, has from ye great variety of peculiarities wh attends ye law respecting it, been considered as a distinct head in most of ye digests of ye law. It has been said, ye a Pawnee, yt he differs differs from a Bailee since he has a special property in ye thing pawned: but there is no distinction in reason. + Co 88. Co Litt 89. n. Indeed upon ye Title, there has been more necessity of opinion, yn upon any other in ye Law. of its limited extent.

As a universal rule, yt every bailment vests a qualified

property in the bailee: for a mere lawful possession gives a special property and implies a right of possession. 2 Red. 112. Jones 1, 2.

In Southcote's case, 4 Co. 83. or 83. 4. Not to sell 8 J. a. and 3. Atks. 46. there was a distinction made between Pawnee and Bailee. but since then, in holden there is no difference. The nature of the interest vested, is in most cases the same. The only shade of difference is in the degree of property vested. The pawnee having a higher interest and a stronger lien in the goods than the bailee.

It must appear from general principles & analogy, as well as from authorities, that the bailee vests a special property in the Bailee. For every lawful poss^n vests a qualified property in the possessor; even the finding of property will vest a special property in the finder: so that he may maintain trespass or trover against any one, who unlawfully deprives him of the possession. Pl. Co. 39. 7. C. 1. Str 505.

The bailee has an undoubted right of possession against persons not the Bailor and even against him in certain cases. & when so possessed by the contract. If the bailee, then, has the right, he must also have the right of enforcing it. Also. Jones, right and be a mere nullity. Str 815.

As a general rule, that the bailee is in his obligation to restore, must keep the property according to the terms of the contract and be answerable to Bailor for any loss or damage, which it may sustain while in his possession.

But to the foregoing rule there are some exceptions, as where the loss or damage was occasioned without any negligence or misconduct on the part of bailee.

In determining on the bailee has been guilty of any

circumstances, y quality of y goods bailed, y nature of y bailment, y advantages of y parties in regard to y subject matter, y his own conduct, must be taken into consideration, & lead to y determination of y question, wh is one of y most difficult in y law. Jones. 8. Gold requires more care than possessed.

In general y bailee is bound to use a degree of care proportionate to y nature of y bailment. In some cases ordinary care is required. in others less, & in other cases more. 1. Bac. 230. Jones 8.

Ordinary care is yt wh rational & prudent men in general use in conducting their own affairs. Jones 9. 10

The degrees of care on either side of yt standard have not a distinct appellation. Whatever exceeds, is called more yn ordinary care, and whatever falls short less yn ordinary care. Jones. 10. 11. 13. "Ex pro sum facit se pro lacium"

To every degree of care, there is a corresponding degree of neglect, The degree of neglect opposed to ordinary care, is called ordinary neglect. The omission of greater yn ordinary care, is stilled less yn ordinary neglect. and so on in an inverse ratio" Jones 12. 31

Neglect greater yn ordinary is stilled gross neglect and is prima facie evd of fraud, tho' not in all cases conclusive. For if y Bailee is negligent of his own affairs of y same nature, and at y same time yo neglect wt considered fraudulent. Jones preface to y Eng edition. 11. 13. 31. 64. 5. Ld Ray 915. 916.

General Acceptance

A general acceptance is where there is no special agreement

as to ye degree of care or diligence to be used by ye Bailee. "But where there is an agreement ye maxim "Eo pressum agit cessare tacitum".

It has been laid down as a general rule, yt every Bailee under a general acceptance, is bound to use a degree of care proportionable to ye value of ye bailment. Jones. 8.

There are therefore different species of bailments, requiring different degrees of care on ye part of ye Bailee. These are taken principally from ye celebrated distinctions of Lord Holt in ye case of Coggs vs Bernard.

These distinctions are more generally followed yn ye classification by Jones in his treatise on Bailments. 2d Ray 915.

Rules

1st First. where ye bailment is for ye benefit of ye bailor only, nothing more is necessary for ye bailee yn good faith. and he is liable only for gross neglect. If ye goods are lost or destroyed. 2d Raym 915. Jones 15.16. 21.22. 32.51.64. 100.1.2. 4 Co 83. B. 1. Low 2. 245.7. (4 Co 83 Contra not Law)

This rule is founded on ye supposed equity of ye case, perhaps a more equitable rule cd not be established as ye bailee receives no benefit from ye contract, and ye bailment is disadvantageous to ye bailor alone, all yt ought to be expected of him, is yt he shd observe good faith and not practice any fraud upon ye party in charging goods being. + Co 23. where the holden yt ye bailee must keep ye goods then bailed safely at his peril, but ye ant law. But ye bailee may in these cases by special agreement extend his liability beyond ye general rule. and in short he may make himself answer to all casualties, at all events. Jones. 21.3. 2.2.00. 2d Ray 910.

Second. Where y bailee alone is entitled by y bailment, 2d
he is liable for slight neglect. This rule is founded on y
Maxim. "Cui soli commodum sentire debet onus"
Jones. B. 16. 23. 33. 8. 9.

Third. Where y bailment is for y mutual benefit of both 3d
parties, y bailee is liable for ordinary neglect, being bound
to use ordinary care. Jones. 14. 22. 3. 32. 3. 101. 5.

These rules are intended to apply only to cases where y
y contract is implied or y acceptance is general.
There may be express contracts between y parties, by wd
y bailee won't be liable in any case. or he may make
himself liable at all events.

When there only an implied contract y bailment is a
general acceptance: but where there is a special agreement
it is demonstrative of special acceptance.
It ought be remembered yt these three general rules
are dawn apply only to general acceptances.

Different Kinds

According to Sd Foster. where distinctions we shall adopt 8.
Bailments are divided into 6 several kinds.
Sir Wm Jones. divides Bailments into 5 kinds.

I. Depositum or Deposit. Depositum is a delivery
of goods by Bailor to Bailee, to be kept by Bailee
without reward. or hire. This species of bailment is sometimes
called a naked bailment & y Bailee or naked Bailee
also depositary. Since as the bailment is for y sole
benefit of y bailor, y bailee has nothing requires of him
but good faith. & is liable only for gross neglect. Sd. Ray.
912. 13. Jones. 55. 1. Bull N. P. 1. Pow 247. Esh & 618. 1 Pow 247.

II Commodatum or Lending.
Commodatum is a gratuitous loan of goods. or utensils

yet are it is used by Bailee for his benefit and not were
must be specifically returned to Bailor. This is merely
y reverse of y former case. This bailment is for y sole benefit
of y Bailee and he is liable for ye slightest neglect. The bailor
is called y Lender, y Bailee y borrower. This kind of
Bailment is often expressed by y words 'Loaned for use'
Ed Ray. 913. 5. Jones 88. & 89. Bulle 72. or Bac 652.
1 Bac. 243
Poo B. 247. 2. Lev 69.

There is a material distinction b/w loan for use, & a "mutuum
a loan of money or a loan for consumption. The latter
1 Bac 241. is not to be specifically returned but to be returned
Doc Stu. in kind as a bushel of Wheat for a bushel of Wheat.
129. Here y Bailee hath a special not an absolute property,
in y thing loaned. If it be destroyed immediately after y
bailment, y Bailee must suffer y whole loss.
Jones 89. 90 A Mutuum there is no bailment.

III. Locatio et Conductio 12. Letting and hiring—
Letting and hiring is y delivery of goods to be used by y
bailee for hire or reward, to be bailed y bailor. Ed Ray
913. 1. Poo B. 251. Jones 50. 119. Bulle 72. 1. Bac. 243. In this
species of Bailment, bailor & conductor or Locator & conductor
are synonymous with Bailee and Bailee. Sir Wm Jones
places yis species of bailmt under his 5th division, wch he
calls Locatum. wch I think his classification of it very
improper. for in y fifth class. y goods are to be used
in a measure for y Bailor or his benefit.

IV. Vadium 16. Pawn. Pawn or pledge is y delivery
of goods by y bailor to y Bailee, as security for y payment
of y debt due from y former to y latter. Here y Bailor
is called y Pawnor. and Bailee. Pawnee. Ed Ray. 913.
Jones 50. 104. Bulle 72. 1. Poo B. 251. Yelv. 172. Co Litt 205.

V. The fifth class of Bailments is where goods are delivered
to y Bailee to be carried or to have some other act done

to y m by y Bailee for a reward to be paid by y Bailor.
This class of bailments includes y delivery of goods, as well to public as private carriers. Tho' there is a material difference between the 2. or two as to their Liability. A public or common carrier being liable to a much greater degree, yn a private carrier. Ld Ray 913. 1. 18. Bull 72. 3. Jones. 57. 144. 150. 128. 1. Poro 253. 1. Bac. 243.
128.

This species of bailment includes also a delivery of goods. to factors Brokers. Stewards. & Bailifs. In short to Agents generally. i.e. to a common or Special carrier.

VI.

A delivery of goods as in y last case with only yt difference yt y bailee receives no reward for his services. and is liable only for gross neglect. This is called a Mandatum. and y bailor a mandator. vide P. 224. Ld Ray 910. 8. Jones 3. 4. 1. Poro C. 254. or 5 Bull 73. The bailee is called a Mandatary.

I. A Depositum or delivery of goods to y Bailee to keep for y use of y Bailor without any reward. Here as y deposit is made entirely for y benefit of y bailor, nothing more is required of y Bailee than good faith. Poro C. 247. and he is liable only for gross neglect. Bac & Tu 129. Bull 72. Ld Ray 739. 13. 15. 1. Ld Bl. 158. Jones 2 32. 45. Str 1099. 581. 2. Bl. 446. 482. Jones. 645.

I. E. think Poro incorrect when he states yt Bailee is liable for less yn gross neglect. He is indeed liable for gross neglect. but not on y ground of neglect as such. but on y ground of fraud. of wh gross neglect is prima facie Evi. This presumption may be rebutted by showing yt y bailee is equally negligent of his own property. 2. Bl 452. Str 581. 1099. Ld Ray 855. 914. 4 Bl 430. 1 Poro C. 247. 8. Jones 64. 5. Ld Bl 158. Str 851. Ld Ray 912. 14. Jones. 13. 30.

In ye Species of Bailmt, ye contract is imposed by Law, and ye acceptance is general. Sir Wm Jones has advanced ye Plea, (but unsupported by authority) yt where ye value goes wrt or ye goods, ye importunity he ought to be liable is a kind degree of ye wot, then when ye bailmt is procured at ye solicitation of ye Bailee. Jones 67. Ld Ray 650. S. 11. 3. 5 Rccrs. H & Law. 245. 6. 384. 3. It was advanced in Southcote's case yt a general acceptance rendered a Bailee liable at all events. 4. Co 83. B. 6 Bnt 88. a. Palm. 548. 50. (Rol 338. 1. Leon 224. Cro Eliz 815. 2 Bac. 236. 41. & Ld Co i mono) Note ye decision in Southcote's case was correct but ye reasoning wrong.

This has been since denied by writers generally. Viz Ld Ray. 650. Sill. n. Bull 72. Cro Eliz 1022. Cro C. 815. 1. Ins. C. a. 6. b. Com. 2. 133. 5. 85. Ld Ray. 913. 14. Jones 67.

A distinction has been taken between ye liability of a Depositary making a special agreamt. on a valuable consid^n and one making such agreamt. w^th^out consid^n.

15. But ye distinction is now done away. Indeed a Depositary cannot in strictness, make such a contract upon valuable consid^n, for as soon as he receives it is to receive a valuable consid^n for ye Co^d & ye Trust, he ceases to be a Depositary & becomes a Bailee of ye 3rd class. but not relying on the answer of accuracy. This held yt the mere delivery of goods is a sufficient valuable consid^n.

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1 Bac. 241. Doe and Tan 123. Ld Ray 919. 993. 555. 12. Mod 487. Co Litt 245. b. 384. 3 Rccrs & Law. 245. s. 333. 4. 384.

This held in Southcote's case, yt if ye Bailor delivers goods to ye Depositary in a locked chest, and retains ye key, the depositary ant liable for ye goods, but only for ye chest. 1. Bac. 237. 4 Co 83. b. 84. a. 1. Inst 89 a. b. 3 Atks 4. When Sir Coke lived ye doctrine of Bailment was not well understood.

This doctrine is denied by Ld Holt in y case of Coggs v Barnard, for 2. reasons. 1st Because if y Bailee had y key, it cd be of no use to him 2d And wthst it he is no less able to defend y goods from rapine or Theft. Ld Ray 914.

P G Minkes. yt neither opinion is on y ground, wch ought materially, if not entirely, to govern in this case viz the knowledge or ignorance of y Bailee with regard to y contents of y chest: for y Bailee's responsibility or rather his care ought to be proportioned to y value of y goods, or y temptations wch they offer to rapine or Theft. Money or Jewels ought to be kept with greater care, than coarse clothes or wares. Yet if y Bailee was ignorant of y contents of a box containing money, might he not place it without culpable neglect, where he would a box containing things of an Inferior value?

Ld Ray 914. S. or 514. 51. 442. A depositary may at all events, make himself liable, if he may secure yr all risks. But even here he would not make himself liable for y loss or damage occasioned by acts of Providence, acts of violence nor constitutional force Jones. 62. 3. Hob 34. Pow 75. Ld Ray 910. 15. Doe and Tho 130. 1. Pow C. 248. S. 4 Co 83. But in such cases he would be liable for loss by mere theft. This is analogous to y case of a Warranty in a Lease, by wh y Lessor contracts for y undisturbed enjoymt of y premises: but y warranty is e not considered as extending to wrongdoers. 1. Pow 143. The term "Wrongdoers" is used in a loose sense in most of y books.

A Depositary may however by such special agreement, make himself liable for loss by theft, for this is what he could have guarded against by care and prudence. But vs physical force no contracts of y Bailee can be security, for a man cannot bind

himself to do it, wh in ye nature of things he cannot perform.

∴ a verbal contract will therefore render ye Depositary liable for theft or what is easily guarded vs. 4 Co. 88. 33. Ld Ray. 915. Jones 75.

If ye depositary returns goods after they are demanded by ye Bailor, he is liable in an action of Detinue, Trover or assumpsit. 1. Roll 128. Cro E. 781. Jones. 114.

II Commodatum or Gratuitous Loan.

Here as ye bailee is alone benefitted by ye Loan, he is according to ye 3d general Rule to be liable for a slight neglect (wherein a top inserted): for ye maxim qui sentit commodum debet sentire onus" Bull 72. Ld Ray 919. Jones 91. 1. Vin 248. 58. 1. Bac 244.

In a reasonable degree of care must be taken, in ye different cases, each case must be determined by its own particular circumstances. As Example has been given. viz. If a borrow, a horse and puts it in a stable with shutting ye door, he is liable if ye horse is stolen, But he would not be, if ye door was shut or locked. Ld Ray. 919. 0. 1 Vin C. 248. 58. 1. Bac 2. 1. Bac 244. Jones 91. 2. 61.

This example might be good in some cases, but not in all. As in case of open violence, wh he could not resist. Where if he use as much care as lawful lod he be liable? Qe thinks not. But on ye contrary Borrower is not generally liable for loss occasioned by force wh he cant resist. Hence a borrower ant prima facie liable for robbery. To make ye bailee liable in such case Bailor must prove ye property was wantonly exposed. Vin C. 257. Ld Ray 919. Jones. 61. Qe. n. As if Bailee that travel in ye night in a road frequented by Robbers. and wh was generally considered as unsafe.

or borrower not in general liable for those accidents which are
or inevitable, as Lightnings, Earthquakes
&c. yet even in those cases he would be liable, if he
shd wantonly expose y property to such damages as by
putting a horse on board of a Boat in time of a Tempest.
Ld Ray 918. 1. Bac 259. Co 249. 50. Jones 61.

A borrower may render himself liable for a loss occasioned
in whatever way, by breach of Trust. From yt moment 20
he becomes a Trespasser, and is entitled to none of y
immunities of a bailee. Thus if borrows a horse of B to
ride to N & back, & directs his way towards Boston,
if the horse shd be killed by lightning, he wd be liable.
Jones 98. 9.

So if any one borrows a horse or chattel for a limited
time as for 24. hours, and doth not return it within
within y time limited, he liable for any loss wch
may happen after y time has transpired, and he may
be sued for y property. Ld Ray 917. Jones 98. 9. 1. Bac 253.
Cro J. 244. 1. Bac. 244. And this rule as to breaches of
Trust, holds as to every species of Bailment, in General.
Ld Ray 917. 1. Bac 253. 8. Cro J. 244. 1. Bac 253.

III. Locatio or Conductio, or Letting and Hiring.
This is a loan of property, to be used by y Bailee,
for his benefit or use in consideration of reward or hire
paid to y Bailor. Infra

By yo contract gains a qualified property in y thing
bailed and y Bailor an absolute right to y hire or
thing to be paid. Ld Ray 913. 15. Cro J. 625. Jones. 119. 20.

Here as y contract is eventually advantageous to both
parties, y risk ought on principle to be equally divided
between ym. The Bailee is bound to use ordinary Jones 14. 120.
care and no more, & is liable for ordinary neglect and no less.

Ld Holt, says, yt y Bailee is here liable, or bound to use to y utmost diligence and consequently liable with a Borrower.

But this is contrary both to precedent and analogy. Ld Holt used loose language on this occasion, and laymen his doctrine, y principle is settled, yt a hirer is bound to use ordinary care. Ld Ray. 910. Jones 31. 21. 23. 120. 1. Vern 257. Jones places yr mistake in y mistranslation of y Latin Interpretation. Bale 272. Bracton Folio 32. Jones. 34. 122. 3.

— 2 Ch Cases 1.

There is no recorded case, where more than ordinary care has been required. Nor no analogous case requiring more, y there is of course accused in case of Robbery. Tho it would alle. y decision, if he had wantonly exposed y goods. Jones 126. 120. 3.

Was ever a question, wn Bailee was bound to repair wn Instruments, or other article lent him. Sutton now settled, yt if Bailee wears out, the thing bailed he must repair it himself. 1. Jones vs Parvis 321. 1 Bac. 531. 21.

IV Vadum. Pawn vs Pledge.

So y delivery of property by y Bailor to y Bailee, as security for a debt due from y Bailor to y Bailee. Jones. 50. 104. Ld Ray. 913. Ld Holt 235. 1. Bac 237. This definition not safe, considering it for property may be pledged, to indemnify, where there is no existing debt.

On this subject it may be material to observe, yt in analogy to y Law of Mortgages, if goods are delivered to secure a debt due from y Bailor to y Bailee, accompanied with a right of Redemption, whatever may be y form of y contract or its terms — yt still is Pawn. 1. Ld Ch. 114. 2. Ld Ray. 913.

This kind of Bailmt being advantageous to both parties
1E. by securing y Pawnee's debt & procuring forbearance
to y Pawnor. Pawnee is to use ordinary care, & he
is liable for less y an ordinary neglect. Ld Ray
117. Jones. 135. 1. Vow. 282. Salk. 523. 4. 4 Com D. 258.

But in Coxmeeter case, La Co says yt y Pawnee is
bound to keep y goods as his own. and is liable only
for gross neglect. as a depositary and y reason assigned
is yt y Bailee has a property in y goods.

But every Bailee has a property in y thing bailed, so
that there is no ground for y distinction and y Rule
founded on it, ainot Law. Contra Bac and Ter
129. 4. & 88. B. Ryberton 172. 1. Bac 211. Jones. 105. 12.
18. 1 Root 82. a. Ca. Ed. 82. a.

It follows that when y loss is occasioned by robbery, y
Pawnee ant prima facie liable tho' he may subject
himself to any loss by a breach of trust or wanton
exposure of y property and where y degree of care required
of Bailee, dont exceed ordinary care, he is secured
from liability by a loss from robbery as contradistinguished
from Theft. Salk 522. Ld Ray 116. 17. Jones 105. Bracton 99.
Pond. 0b 167. J. 111. 6 Mod 252.

In Coxmeeter case it was said that yt pawnee ant
liable for losses occasioned by pure theft and y reason
assigned is y same as yt assigned above. to show that
he is liable only for gross neglect 1E. his having a
property in the goods and his being bound to keep
them as he keeps his own.

Jones holds unconditionally yt the Pawnee is liable
for a loss occasioned by Theft & his reason is y same
as yt assigned by Ld Coke. in Coxmeeter case. he
says yt y Pawnee cannot be supposed to have used

ordinary care, if he permits y goods to be stolen from him. Jones 106. 7. Cro 624. 5. Palm 551. Yelv 17. 4 Co 83. B. Sneed 89. a. 1. Bac. 257. Jones 60. or 61.

But Jones clearly contradicts himself as were as y analogy of y Law. For not true y ordinary care yields after protection or a Theft or a loss by Theft. But contrary to General apprehension to assert, y man of common prudence don't suffer by Theft. Tis a question of fact, an ordinary care was used or lost, and this must determine y Pawnee's liability. Jones 92. 61. 109. 16. 38.

Ld Ray 917. 18. Salk 522. 1. Ventris 121. 1. Pow C. 252. Lord Holt places y liability for a loss by Theft on y same footing with y of a factor who is excused, if he used reasonable and ordinary care. See Ray 917. 18.

Indeed Jones himself says yt in commodatum y borrower is liable for loss occasioned by theft, nie he used extraordinary care. Ld Ray 917. 8. 1. Vent 121. 1. Pow 252. Jones 92. Salk 522. Jones 109. 16. 138. 126. 61. or.

The pawnee like other Bailees gains a qualified property in the thing bailed. But y s interest is defeasible. as by payment on y day (wh vests his Title at Law) so of Mortgages) his interest is determined. Also by a proper tender wh for any purpose of divesting y property of y Pawnee. is equivalent to a Payment. 1. Bac 237. Bull 72. Cro J. 244. 4 Co 83. b. Yelverton 97. Jones 111. 2 T R 27. Hob. 288.

If after tender and demand of y property, if after payment on y day appointed, pawnee refuses to restore it. he is guilty of a breach of Trust. and is of course liable for any loss or damage, wh may be sustained by the property, while in his hands or superior however it may be occasioned as by Lightning &c.
Salk 522. 3. Ld Ray. 917. Cro J. 625. 2. T R. 27. 4 Co 83. b. 1. Pow 253. 1. Bac 237. 8. Bull. 72.

And on y Pawnee's refusal to redeliver y goods after payment y Pawner may immediately commence an action of Trover, Detinue, or assumpt. vs him.* The pawnee in case of a breach, is not only liable for all damage afterward, occasioned to y property, but is immediately liable for y breach of Trust. Bull NP. 72. 1 Bac 237. 8. Cro J. 244. Salk 441. Jones 111. "Title Trover 64."
Rule is y same if y refusal is made by y Pawnee's clerk, agent, &c. acting regularly in the ordinary course of his business, for yo is equivalent to a refusal of y Pawnee himself on y maxim. Qui facit per alium facit per se". But if y refusal of y Pawnee &c was out of y course of his regular business, Pawnee wd not be liable. Cro J. 224. Jones. 111. 12. 26. Salk 441. Moor 842. Cro E. 615. 1. Sow. 253. Ed Ray 917.

In this case however, y Pawner may have his election of 2. actions, Trover or assumpsit. The breach of Trust is y foundation of y action of Trover, and y breach of an express or implied contract, y foundation of y action of assumsit. For in Bailmts y pawnee impliedly or expressly agrees in relation to y property pawned, to return it on y day appointed, provided y debt is satisfied by paymt or Tender. vs Bull 72.* Bac. 237. 8. Com. D. 220. 4 T. 258. Cro J. 244. Jones. 114.

But y Pawnee can have neither of these actions, till he has paid or tendered paymt of all yt is due, both principal and Legal Interest, even where y property was pawned as Security: for these actions on y case are founded on Equitable principles, and he who seeks Equity, must do it. 1. Ch R 153 This rule would not apply, if detinue, a C Law action, were brot.
"Mary 30"
A refusal to deliver up property pawned, after paymt or Tender, of paymt of y sum due, is an indictable offence at C Law. This rule and general as a mere

breaches of Trust. they being considered only as Civil injuries &c. not offences. On this subject, there was a diversity of opinion, but it seems now to be settled. Salk 282. 222. 3. Cantra Scott 277. 2. Hen 210. 1. Bac 240. 2. 4 Com. 258. Salk 522. 3. 3 Ind 307

2 Hawkins 210. or 110

This is a mere rule of policy, for the bailee of a bailment of trust, in yr case is no more culpable, yn in any other. The object of y rule is to protect y bailor, from oppression. The danger of wh is greater in this yn in almost any other species of Bailments, as y transaction is generally secret. y Bailee is enabled to conceal y fact & further are usually made by persons necessitous and embarrassed.

The bailee has in some instances a right to use y property bailed. This right, when it exists, is said to be founded on y consent of y bailor, either express or implied. This presumed right is said to exist or not in general as y property is likely to be improved or injured, or not affected at all by y use. Jones 112. 3 Salk 522. Bull 72. 1. Rol 338. 9. 3. 1. Brot 82.

If case in wh property can be made better, by use, can relation occur. Jones supposes y case of a dog wh is trained or confirmed in useful habits, by certain employments. Jones. 112. 3.

And it seems when the things bailed are of such a nature as not be injured by the use, y Bailee has a right to use them. but it is at his peril, for y use is for his own benefit & he is liable at all events as if he had been robbed. The assembly cases are Bowly &c But wh these things will wear out, still y injury done to them by careful usage, is so small yt the law won't regard it. Salk 522. 2. Bac 238. Bull 72. 1. Rol 338. 9. 3. Ld Ray. 917. Jones 113. Co Litt 89.

1. When ye pawnee is at expence in keeping ye property pawned, he may reimburse himself by using it, as when living animals are pawned. This P.C. thinks doth arise from any consent of ye Pawner. but is allowed by Law as a recompence wt ye principle of justice demand. La Ray. 910. 7. Cro 9. 125. Salk 522. Bull 72. Jones 114.

2. I have not say's P.C. discovered from the books, yt ye Pawnee is liable for ye use. 1C. ye profits. He was by the Roman Laws. Jones 115.

But when the pledge will be injured in the use, & ye keeping of it incurs no expence, ye pawnee has nt no right to use the property, because ts said there is no consent implied on ye part of ye pawner. But P.C. thinks ye Law doth refer to ye reason. For the duty of ye Pawnee is to keep and restore ye goods safely. when ye debt is paid. & as there is no expence incurred in keeping the property, there arise any principles of justice wh wd warrant ye Pawnee in using it. La Ray. 917. Bulk 72. Jones. 113.

And as ye Pawnee has no right to use the property if he does use it. P.C. thinks, he is "ipso facto" guilty of conversion & liable in an action of trover. For in ye action unlawful use is per se a conversion. 5 Bac. 287. 267. 8. Vide Trover.

The Law is the same per La Holt with respect to ye finder of goods. The liability is continually ye same. The finder of goods is surely not liable in assumsit. for there is no contract between ye parties. ye action must therefore be "Ex delicto"

The finder has no Lien upon ye goods, as the pawnee has. tho ye same degree of care is required of him. Pow says the finder is bound to use ordinary care

in preserving the goods for y true owner. See Ry Ch. 1 Row. 232. Correct Ch. Marks.

There is a case in Cro Eliz 24. in wh to said yt y finder ant bound to keep y goods in safety and that he ant liable for negligent keeping. Cri a mere dictum and P. J. thinks it ant supportable on any principle. The determination of y case was correct, tho' y reasoning is erroneous. See D. Ord. 1. Bulst 21. 1 Leon 123. 1. Bac. 244. Salk 282. 143. 1. Hole 251 6. S. Bac. 237. 5 Burr 2827. Hob. 257. 8. Co 146.

Now it wd seem on first inspection yt y finder shd be subjected for nothing, but gross neglect, for y sole benefit accrues to y owner. & the finder cannot compel him to pay him to say any thing for his trouble. The finder here being in y case of a depositary, but in y case of a depositary y bailor delivers his goods or not. w he pleases. and has y selection of his depositary. This ant y case with goods found, wh in strictness cannot said to be bailed & it wd seem that y finder shd use ordinary care or leave y goods to be taken by somebody else. who is honest enough to use such care.

The ct Law of Court enables y finder to recover a remuneration for his trouble and expence. More then y finding is clearly advantageous to both parties, and the finder is bound to use ordinary care. upon the first principle of Bailment. See Comm. Dig. 6.

P. C. thinks y Law rule is y same. tho' y reasoning in y case of Cro E. is wrong. Yet yt case was an action of Trover vs y finder of goods. which were stolen while in y hold of y finder. tho' his negligence was alleged. On the demurrer being held yt y action wd not lie. ~~for a mere nonfeasance~~ for trover. for the action of Trover wd not lie for a mere nonfeasance. But y dicta of yt ct in yt case ant Law. 8 Co 146. 5 Burr 2827. Hole 251. Ers D. Ord.

1 Hole 6.

'Tis well settled yt at C Law. yt y finder has no lien upon y goods. for his trouble and expence. but upon demand made by the true owner, with proof of ownership he is bound to deliver the property. and shd he refuse to deliver it, he is guilty of a conversion and is liable in Trover. 2. H Bl. 254. Str 65. 2. Bl. R. 1117.

"Trover 54" "54"

But y case of Salvage is different as where goods are wrecked & abandoned at Sea, y finder is entitled to a reward. This is a principle of y public law of Nations. not of y C Law. 2d Ray 268. 2. T R 86. 254. 5 Bac. 275. "Trover: y title of" Salvage

But tho' it has been agreed yt as yt y finder has no lien upon y goods, it has been a modern question, an at C Law he cd in my opn recover a reward. If he can recover at all, it must be by "Indebitatus Assumpsit" for work & labor done, & founded on an implication of request and promise. The act of y finder is a mere act of courtesy, & a voluntary courtesy will not support an action at C Law. Hale 104.5. I don't see therefore any ground of recovery. 2. T R 86. 258. Bls 87. 88. Holt 150. Hovert

But a refusal by the finder to deliver y goods to y party claiming ownership on demand, is not necessarily a conversion, as the party claiming them, offers Evi of ownership. The finder is then made the Judge, an, the ownership is satis and the correctness of his decision is to be determined by a Judge. in an action of Trover. and y finder refuse to deliver them, after Evi offered, held be a conversion. 2. Bals 312. Bls 590.

But there is not one case decided in the books to my knowledge. A finds Goods wh actually belong to B. & demands y m. and on wh refusal to deliver them, he brings an action and by false testimony recovers the full value. How can the true owner bring another action to recover the value again? I was decided in Comm.

yet the amount recovered. 1. Roll. 445. But if any
correction of the decision on the ground that hereby
the Law omitted a reason to pay a sum of money for a
given cause, or consideration, will not compel him
to sue it again. Thus where a debtor has been compelled
by an action to pay a debt to a wrongful Court, the
Law will not compel him to pay the debt again to
rightful Ct. See in substance of the Principle, Bonnetjoy
3 Mc. 123.5. 2. Bac. 11. Doug. 141. 101. 1. Ld. Ray. 445. cor. 2. Ld. 408.
Doug. 681. A record between 2. parties A and B. and
Evi between the parties B and C. 1st of the principal point
determined. As here it wd not be Evi that the right of
the property was in B. But tis Evi that a judgment
has been had by B vs. A. Cook Bank Law. 3. 6.

But as the subject of Pawns. if after a tender of payment
by the pawner. & a refusal to deliver the goods. by the pawnee.
pawner recovers in an action of Trover. the Pawnee may
still recover his debt, tamen his breach of Trust.
He must however make demand of the money tendered.
1. Ld. 29. 3. 1. Ld. 531. 6. "Tender" Title

If perishable goods are pawned and decay in the hands of the
Pawnee, he dont for this reason lose his debt, & he may
sue and recover for the debt and duty remaining, tho' the pledge
is lost. Indeed this be a very unjustly connection to make
one answer, for the pawn is not of more than half the
value of the debt. but generally of double and and the Law
gives the Bailee a mutual remedy. Again the pawn is never
considered a satisfaction but only a security for the payment
of the debt. 1. Bac 238. Yelv. 79. Sm. 200. Cash 223.
3 Burr. 734. 1. Bl. R. 507.

While a pawn remains unredeemed in the Pawnee's hand,
he may sue for the debt and recover, nil there was an agreement
to the contrary 1st. that he shd rely on the pledge only.
Str 915. Bro. 85. Yelv. 79. 4 Com. 255. 2. Lev. 10.

Power unless mort be y conduct of y Pawnee he is still entitled to his debt. Pawnor however may recover for y loss of his goods, and thus Justice will be done. .. Ins 269. Pack 528. .. Bac 253.

and where y pledge remains unredeemed in the hands of y Pawnee, he may sue for his debt, nil he has waived his right by an agreement yt he will rely on his pledge alone. for y pledge aint a satisfaction of y debt. Str 916. Yelv 176. 2. Leo 55.

If a debt for wh the goods are pledged, aint paid by y day abbointed, y property in the pledge becomes absolute in the Pawnee by Law. and is forever gone from Pawnor, the principle is y same as in the Case of mortgages, y equitie of wh being broken, y Title becomes absolute in Mortgagee. and in analogy to the Law of mortgages, y Pawnor has an Equity of redemption Coventrie 126. or 188. .. Ins 205. 3 Lev 338. 2. Atk 333. or 3. 38. Co Litt 205.

It appears to me however, that yo right of redemption can be exercised only where y property remains specifically in the hands of y Pawnee, or has been assigned to yo him as a pledge. For by the debt not being paid by the day, y property in the pledge is absolutely vested in the Pawnee at Law. and he may lawfully sell it, See 22 Vol Christians Observor Abri. 175. where the end Pawnee is obliged to pay back y Surplus to Pawnor. - and also in this case, that if not paid within 12. mth, and 1. day, y Pawnee may sell and if he receive any surplus over debt and expences, they must be returned to Pawnor. Lord Thinks, that where no no time is abbointed, the Law abboints this time It dont appear from the Report. he saw.

A distinction is to be observed between a pawn, and a mortgage of personal property. There Mee has a general property in the thing mortgaged and there is no Equity

of redemption after ye day of payment has passed. This mortgage dont create a mere Lien as a pledge does. Jones. 8.88.8. 1. Ves Jr 278. 2. Caine 200. 5 John. 258. 395.

But in the case of pawing property properly so called, the right of redemption exists after forfeiture, even tho it was agreed at ye time of making ye contract, yet if ye property was not redeemed at ye time appointed it shal be consid^d as sold. This is an analogy to mortgages, "once a mortgage always a mortgage" This maxim applies equally well to Pawns. But this maxim dont ~~exp~~ precisely express its meaning, wh is, that if property is once conveyed as a security with a right of Redemption, no collateral agreem made at the time, shall destroy the right of Redemption. This rule is intended to protect defenceless debtors from oppression and extortion. 3. Ves 508. 1. Bac 38. or 25 8. 1. Br or 4 Ed Ch. 114. 3. Ves or Kem. 268. 1. Bac 29 239. 8.

A Factor cannot pawn the goods of his principal so as to give the Pawnee a lien upon them as against his principal. 7. East 5. 3 Ed Ch 684. 2 Ed Ch. 301. "Master and Servant, 24 onward" Str 1178.

The reason appears to be, yt the Factor has only a Lien himself & that as a personal right wh cannot be transferred. The contract producing it, being fraudulent: a Lien of this kind cannot be transfered in any case, and certainly not in this. The principal is willing to trust the Factor, and to give him a Lien on the property, till their accounts are settled but he dont give him power to appoint a new keeper. Str 1178. 4 Com. 22?

It is now settled yt if a Factor pledges ye goods of his Principal to secure a debt due from himself, ye principal may maintain Trover, after demand, and without Tender of the amt due to the Factor. The act of pledging is a breach of trust, by wh he forfeits his Lien. Str 1178. 3 T. R. 404. 1. H Bl 382. 7. East 5.

On failure of payment by the day appointed, the Pawnee is at liberty to sell the Pledge, for the Property is absolutely vested in him by Law. 1. Bro. 208.

According to some opinions, he may sell or assign the pledge before the day of payment. 1. Bull 29. 31. Owen 124. 1. Bac. 232. 1. Ver 350. 4 Ent. 288.

But these opinions for various reasons cannot be correct. Every Bailment implies a contract strictly Fiduciary, and Bull observes that a Lien is a personal right, wh cannot be transferred. Ld Ellenborough expresses the same opinion and a similar doctrine is deducible plainly from the former cases. Bro P. 244. Yelv 178. 5 TR. 606. 7. East 9.

The decision of this point one way or the other, is very a important, for if an assignment before the day is not Legal. it follows that the Pawnor need ~~can~~ not tender payment. to the Pawnee. but may immediatly claim of the Pawnee. and if he refuses, he is "ipso facto" guilty of a conversion.

It appears contrary to the analogy of the Law. that a pledge shd be assigned or assignable. Assignment of a Pledge.

Tis clear that a pledge cannot be forfeited to the King. by act of the Pawnee. as by his Treason. Felony &c. 1. Bac 138.

But a person may thus forfeit, what he is capable of enjoying in his own right. 12. what he can convey by contract. 1. Just 8. 12. 12. Co 12. Bro Abr 55. 1. Bac 238. 2 Co. 7. 1 Ver 238. Moor 100. 1. Ves 359. Co Litt 8. 2 Bac 376.

Tis also settled that a pledge cannot be taken in Exd to Pawnee., because the interest of Pawnee is of such a nature, as to render it dangerous to the rights of Pawnor. to allow it to be thus taken. 1 Bac. 258. 352. Dyer 67. B. 76. B. 1. Owen 124.

It is laid down in Brooks abridgmt yt a Lien cannot be "alienated" evidently meaning that it cannot be assigned. 1. Ves 339. 1. Bac 238.

I think it appears from the authorities, analogy and principle, that a pledge cannot be assigned before ye day of paymt. A pledge is in the nature of a personal trust. and if it cd be assigned, ye Pawnor wd be in a dangerous situation: for if ye Pawnee shd become a bankrupt and the Pawn lost through Fraud or Misconduct, ye Pawnor cd not resort to the assignee.

This is the principle wh governs feudal acts relating to Real Property as Lands. They can't be converted or embezzled. Nor can the Mere insolvency or knavery prevent a redemption. But a Chattel may be run away with, embezzled or destroyed.

There is a case in 2. Ves. 691. It wd seem to show that a pledge may be assigned before the day of Paymt. As if pawned goods to B. who directly afterwards and before ye day of paymt, pawned them to C. it brot a bill to redeem of C. and was decided that it shd pay the sum due from B to C. as well as that due from himself to B.

But it is to be observed, the bill was brot after Forfeiture (Otherwise he wd have brot his action at Law and not in Equity) when the equitable interest of ye assignee was precisely what it would have been, had the assignmt been made after the Forfeiture. To have raised the question for discussion, it should have appeared, that there had been a tender of paymt to ye Pawnee. or the action should have been Trover and brot at Law. Point not yet settled. 2. Ven 691. 8. & Cas 683. Pre Ch 419. 20.

But the Pawnor may forfeit his interest in the pledge by Treason. Felony. But the King or Subject cannot take ye pledge without paying the debt due from the Pawnor. for ye interest forfeited by ye Pawnor. is only an Equity of Redn. 1. Bac 235.

1 Bulls 23. Yelv. 179.

According to P. C. the fair construction is, that a Pawnee cannot assign before forfeiture, and if the Pawnee were to assign he would be immediately subject to an action in Trover. The assignee would also be liable, he must deliver up.

It was clearly held essential to a Pawn, that it shd be delivered at the time when the debt accrued, wh it was intended to secure, and that if it was afterwards delivered, it was not a pledge, but a loan to excuse a Trespass in taking it, to be retained during the Pawnee's pleasure. 43
But this aint now so. and to settle that the pledge may be delivered as well after as at the time of contracting the debt. Esp 87b. 2. Lev 30. 1. Bac 238. Yelv. 104. Bull 35. 1. Bulst. 35. 1. Ver 356.

It was formerly doubted, an. if no day of payment was fixed, payment or tender would revest the property in the Pawner. wi made during the life of the parties.
Tis now settled that in such case, the pawner may redeem at any time during his own life — tho' this is denied too. 1. Bac. 233. Cro J. 244. 3. 2. Bulst 29. 2. Ro. R. Yelv. 178. Ld Ray 434. 1 Ver 78 Provided however that the pawnee don't call on him sooner to redeem. This point has been adjudged. so since the rule was laid down. see 2. Caine 206. But where no day of payment is fixed, the pawn must be redeemed, (i.e. tender or payment made, if at all,) during the life of the pawner. For payment or tender by his Exr will not avail at Law. The reason of this is that there ought at Law, to be some limitation i.e. to the right to redeem. for seems the pawnee might suffer. For tho' he may sue in the meantime, the pawner may be worth nothing, or may be out of the reach of process, and thus the only remedy, not be the Lien on the Pawn. Ford. and 4. Com. 208. Pr Ex. 420. Cro J. 244. Yelv. 178. There not remain no right of redemption after his death.

Bac. supposes that there was still the right of Redemption in Equity after the death of the Pawnor, because he had a right to sell the pledge after a forfeiture at Law. 1. Bac 239. 1. Inst. 205.

If a day of payment is fixed by the contract, the Pawnor's interest isn't forfeited by his death, tho it occur before the day of paymt. But after his death, his representative may redeem by payg or tendering, just as the Pawnor might, if he had lived. 1. Bulst 28. Bac. 239. 4. Com. on Contr 259.

5th Class of Bailmts

Bailmt of the 5th kind is a delivery of goods, to be carried or to have some act done, to them by the Bailee for a reward paid him. Jones 50. 127. 8. 32. 4. 44. 2d Ray 913. 17. 1. Bac. 343.

This class includes a delivery to a common carrier, a private carrier, an Innkeeper, Mechanic, &c. and the 2 different classes of Bailees viz. Common Carriers, and Private persons, require a distinct considn. 1 Jones. 133. 4.

A delivery to a private person, includes a delivery to a private professional character. As to Tailor Bailif. Broker, or any private agent in General. Includes a delivery of Beasts to pasture to an agisting Farmer. 2d Ray 918. Jones 50. 128. 9.

This bailmt being advantageous to both parties, the Bailee is bound to use mdr ordinary care, and is liable for only ordinary neglect. And this is proved both on principle and authority. 1. Roll 4. 2d Ray 98. Pow C. 254. 12 Mod 487. Jones 14. 22. 32. 38. 487.

A Bailee of this class is prima facie accountable, (the same as in 3d class) in the case of robbery, as the other Bailees before mentioned. Jones. 129. 130. 5. 1. Inst. 89. 2d Ray 918. Hobt 131. 4 Co 84. a. Moor 402.

In case of more loss by Theft, y Bailee is liable or not. as it appears that he used ordinary care or not Jones 139., vent 121. Ld Raym. 916. 2. Lev. 51

If the thing bailed is distrained by Bailees Land Lord. for rent. as it may be. the Bailee is liable, it seems. for permitting it to be distrained upon. instead of his own goods. He must be liable at least for ordinary neglect. Jones. 141. 2. 3 Bl. R. 3 Burr. 1468. 1398.

It wd seem that he is liable independently of all neglect. for as the Bailor's property has been sold to pay his debt. he shd be liable as for money laid out. and Expended for his own uses. Here he is no Loser. for he says only for benefit received.

According to Jones. if metal is delivered to a Smith, to be wrought into an Utensil, y Smith ain't liable as Bailee. Such delivery he maintains, vests the property absolutely in the Smith as a mutuum, and if a Loss happens. he must be liable at all Events. Jones. 83. or 9. 149. 143. The reason is, the metal when wrought. cannot be identified. 2. Bl. 404.

This seems to be incorrect, tho it seems that the owner cannot identically know the metal, yet if the fact can be proved that it is the same, it can be identified in point of fact. and therefore can be specifically restored. The hardship of y case is another material objection to y doctrine. If the metal were destroyed even by the act of God., before any alteration made. the Smith wd be liable In case of a Mutuum the Bailee purchases the property delivered. to return an Equivalent. Here tho no injury wd arise from the Smith's using the metal for another purpose. Yet he has strictly no right to do so. It is considered by Jones as a Mutuum in wh case the Smith wd be a purchaser. But

it ant strictly a Mutuum. In the case of a Mutuum
a mere not undoubtedly hold. as where wheat is
loaned to A. and is consumed or destroyed. There A
is actually a purchaser. P is liable at all events.
2. Bl Rp. 4 44. Popham 38. Moor 20. The C Ct of
N York have rejected this Rule 13. Pors 44

When property is delivered to a Bailee, who is a person
of some act. of skill about it, or about it in his professional
character. or in the line of his occupation for hire the Law
assumes a tacit contract. on his part. It not only
implies a contract that he will redeliver it, when the
purpose of the Bailment is answered. But also that the
work shall be performed skilfully or in a workmanlike
manner. 11. Co 54. a. 3 Bl. 165-6. 1. Saund 324 Cro 601.
Jones 128-9. 3 M 40. 1. Ld Rm. 158.

"50" But if the act to be performed is not in the line of the
Bailees ordinary or common avocation, the Law implies
no contract on his part that the act shall be skilfully
done and therefore the Bailee cannot be liable in be made
an Co Brew grounds that it ought be done skilfully. 3 Bl. 166
Cro 601. Jones 128-40. 1. Ld Rm. 158. See "action on the case".
As to Insurance P.G. thinks, it ought depend on the
usage of the place.

If goods of a strana are delivered to a Bailee and are
lost or destroyed for want of that care. wh is required
of him by Law, he ant entitled to wages for the Labour
previously bestowed upon them. This on principle seems
to be the rule. Mr There is little said on the subject.
in the books. 3 Bac. or Burr. 1592-3. Cro Dig 96.

But if the property shd be lost after the labour had been
bestowed & without the Bailees fault it wd seem he wd
be entitled to Wages. 3 Bac or Burr. 1592. 3 Cro 86.
Jacus says P.G) if lost by the Bailees neglect. or fault.

Common Carriers have become so frequent now, that the Law considers them as very important.
A common carrier is any one, in general, who makes it his business to carry the goods of another for hire, as a Waggoner, a Porter, Drayman, and also a master of a Ship employed in carrying freight. Ld Ray 918 Jones 143. 157. 4 Co 84. Ray 220. 1. T R. 27. Esp 617. 1. Bac 345. 343. Allen 73. or 93. Cro J. 330. Jeremy's Law of carriers.

It seems formerly to have been doubted, any other than a carrier by land, came within the description of a Common Carrier. The Law on the subject was first extended to common Waygman, in the reign of Jam 1. and to Ship masters in Ch. 2d Jones 143. Ibid 152. Yelv. 178. Cro J. 330. Ld Raym 918. 1. Vent 190. 238. 12 Mod 487. 2 Lev 69. There is now no doubt of the liability of carriers on the water. 1. Selw. 313. 4. Saun. 718.

The masters of ships carrying goods for other persons, are then Common Carriers, in case of a loss, and in case of a loss a action may be brought either vs the owners, or the master. In strictness at Law, the owner alone would be liable, as the master is his Servant. But there are many reasons which render it just and necessary that the master shd. The freighters often know nothing of the owners. Salk 440. Carth 62. 3 Lev. 259. 1 T R 18. 78. Esp 623.

By the Eng Stats 7th Geo 2d and 26. Geo 3d it is provided that where the loss has happened by the misconduct of the master, or mariners, y owners shall be y subjected to the value of the Ship and Freight, tho' the master wd be liable for the whole. 1. T R 18. 78. Marsh. 180. 1. Selw. 309. 10. 2. Com. 288. Abbot 231. This Statute dont prevail here. E in the Ch

If a common carrier having commenced to carry the goods of another, having his hire tendered to him, refuses to carry them, he is liable to an action on the case.

For by assuming this public character he impliedly holds out an offer to carry for any one applying to him. So that there is an implied contract to carry them. Bull 70. 1 Bac 180-2. 339. 3 Bl. 165. 2 Show 327. Forency. 6.59. Roy 92. Ycard. 103.

But tho a common carrier is bound to receive property as mentioned in the last Rule, yet he is at liberty to make a conditional or special acceptance. The Law allows him to say that he will not be answerable, or a Package unless he is told what value it contains and is promised that a reward proportionate to the risk is given him, or shall be given him and he may demand it before hand. 4 Burr 2298. Wm 622.

The bailment here being advantageous to both Parties, it wd follow. If there were no circumstances to imbrace the application of the Gen Principle, that the common carrier wd be liable for nothing less than ordinary neglect. and this was the case as late as Eliz 8th In the reign of Eliz, twas settled that robbery was no Excuse. But the Rule at that time calended no further. 1 Rust 33. a. Jones 144. 5. 4 Co 84. a.

The bailment, here, being advantageous to both Parties. it wd follow. if there were no circumstances to imbrace the application of the Gen Principle, yet the common carrier wd be liable for nothing less than ordinary neglect. Arcle Sutora

The rule now is that the common carrier is liable for any loss occasioned in any manner. except by act of God. of public enemies or of Bailor. Bull. 70. 1. 4. Sir Hay 918. 3. Burr 593. Str 128. 1 Ld 127. Salk 18. 1. Mils 281. 1. Cast 609. Ld 610. Jones 144. 5. 6. 3 Day or Hyn. 376. 1 Pow C. 253.

Twill be seen then that the liability of a common carrier is extended far beyond yet of other Bailees, where the bailment is advantageous to both. and the distinction is

founded on Public policy. A great part of ye Commerce of the world, is carried on by Common Carriers & if their liability were exactly the same as that of common Bailees, they wd have it in their power to ruin great gains and be oppressive among themselves. Strangers are under the necessity of trusting them, therefore there ought to be the strictest regulation for the protection of Commerce. Tho' to the argument a different reason wd be given for the reward wh they receive, but the same holds as to private carriers and that he shd receive a reward, is necessary to constitute a common carrier. 4 Co 84. a. Salk 143. 1 Bac 341. 1 Y & C. 34. Sd Ray. 918. Jones 148. Esp 2. 318. 1 East 604.

A common carrier ant liable to ye extent wh he is paid or is to be paid, because if he carries gratuitously, he does not act as a Common Carrier: but as a Mandatory. Carth 485. Esp 621. 1 East 604.

A com. Car. is in ye nature of an insurer at all events, wt acts of God, or Public enemies & of Bailee.
If then the goods are lost by any cause above human control, he is excused. But for a loss by fire occasioned otherwise than by lightning, he is liable. If it be by accident or occasioned by an Incendiary, he ant excused.
1. T R 33. 4. 144. Str 125. 2. H Bl. 113 Dyer 66. a. Esp 620.
1. Selw. 303. 2. Com. 254. E. R. 481. Jeremy 34.

Where goods are spoiled in consequence of a hole gnawed through the side of a vessel by a rat, the bailee was holden liable. Jones. 147. 8. Bull. 70. 1. Selw. 303. 1 Mills 231.
Rule the same for running on Shoals.

He is liable for losses occasioned by ye act of Rebels or Insurgents, for they are not such Public enemies as come within the Rule. 1. Ben 239.
Pirates are Public enemies within ye Rule. But it has been decided that a Shipmaster ant excused for losses

occasioned by Fresh water Pirates. 1E. robbers in Harbour. 1. T R 18. Esp 620. 1 Bent 160. 239. 1. Mod 85. Jones 105 abbot 208. 37. 1. Com R. 487.

If a tempest shd make it necessary to throw the goods overboard, y carrier is excused: for tho the immediate act of throwing the goods overboard, is not the act of God. y necessity was occasioned by the act of God. Jones 107. Rolle R. 79. 2. Bulst. 280. Esp 620. 12. Co 63. 1. Selw. 303. 1. Carrier 43.

There is a case where a box of Jewels was thrown overboard in a Tempest. & the master was held liable for the loss. Probably the box was light and there was no necessity for throwing it over. This decision must have turned on the point, that it was unnecessary. a it cannot be Law. Allen 93. Jones 151.

In the case of loss by throwing the goods overboard, in a tempest, owners, master, freighters, & passengers, must apportion the Loss among them by the Law Merchant, a Maritim Law, for twas for the benefit of all. 3 Bac 594. & Lex Merc^ta 148. 2. T R. 404. Beawes 148.

This is a rule of the Lex Mercatoria wh is a branch of the C Law. 1. East 220. In this subject there is a St in Comm. 1. Comm R. 428. 487.

As to passengers contributing in such case, Sir G Thinter says mistaken. for nothing is brt into the average but what can be deemed a part of the Cargo. Mank. 466.

A Com Car. is excused when the loss is occasioned by y act or fraud of the Bailor. Thus where A delivers a cask of wine to B in a state of fermentation, to be carried and the cask burst in consequence thereof, B was held not to be liable. Bull 67. Esp 621. Bull N P. 74. 69 69.

So where y carrier waggon is full and the owner

insists on the goods being carried & is willing to take his chance, w. his own fault, if the goods are lost. 2. Show 127. 1. Bac 344. 3 Comyn R. 19.

So in the case of Innkeepers, when they must insist.

For y purpose of subjecting the carrier, the goods must have been lost, while in his immediate posst & and under his immediate care and controll.

If the owner sends his servant in the Ship or Ship, to take care of y goods and he takes charge of them, y carrier ant liable for y loss wh may happen. The meaning of the Rule must be, yt the master ant liable as a Common Carrier. He doubtless wd be liable if the goods were lost by his fault or neglect as if y goods shd be spoiled in consequence of the Ship's being unseaworthy. Bull 70. Esp 612. Str 654. 2. Show 327. 6 Mod. 170. Bac 344. 1. Show. 327. Esp. D. 621.

The amt of the Rules, then, seems to be, yt in such case y master ant liable for want of care in y custody of y goods as com. car. but he wd be as private carrier. i.e. for misconduct or want of ordinary care.

But where goods are delivered to a Master and a passenger is merely requested to take the oversight of them. the master liability is not impaired. 1 Roll 2. Cro J. 344. Hob. 19. 17.

It seems yt a com car. is liable for y loss of a box, tho' ignorant of the contents, wd he discharges himself by an qualified or Special acceptance. Secus in case of a Depositary. Bull 70. 2 East 128. Str 148. Jones 148. Carth 485. Esp. 622. 4 Burr 2298. 1. T. R. 28.

And according to two decisions, tho' y carrier is misinformed of y contents by the owner, he is still liable, wd he accept Specially. In one of these cases the owner told the

carrier, yt y box contained articles of small value, when in fact it contained money, but still y carrier was holden liable. Allen 93. 1. Lents. 238. 1. Bac 345. Bull Jo. Jones 148.

In y other case y owner said, y box contained a book and some tobacco, when it contained 100 £. Ibid Doc and Stu 130. 3 Hob. 135. Allen 93.

Both of these cases appear to be opposed to every principle of justice. The books say he may discharge himself by a Special acceptance. IE. in the present case, by saying, "I will not take your word y box contains only books. &c. Ld Mansfield has expressed his disapprobation of y Rule. & the latter opinions of Ld King and Ld Kenyon are also opposed to it. 4. Burr 2304. Str 145. 1. Cast 510 660. a late decision. Selw. 505.8. & G. Monley these cases ant Law. Jones. 148.

If a delivers to B. a box containing £ 1000. telling him yt it contains 100 £. there is a fraud practised upon the carrier. The amt is concealed in order to diminish the price. The carrier has no opportunity of knowing the amt. and certainly cannot be considered in bailee of the 1000 £. He is bailee only of y 100 £. So far as he is informed, so far he ought to be liable. He is in the nature of Insurer against risk. Jones 148. Esp. D. 621. Bull Jo. 1.

Much has been said with regard to a qualified or Special Acceptance. If an acceptance intended to qualify the Liability of the Bailee. To make such an acceptance, it any necessary, that there shd be a personal Communication between the Bailor and Carrier. An advertisement in a public newspaper, may be sufficient to constitute a qualified acceptance. But an it is so, or not, depends upon an y owner had notice of this advertisement. and this must be left with the Jury. Bull. 71. 4. Burr 2298. Carth 488. 1. Hob. Rep. 208. 303-n. Esp 622. Selw. 303.8. 4. Cam. 40.

1. P
531.

Under a general acceptance, in w case of fraud, the carrier is liable for what he receives, but under a Special acceptance, he is liable for so much only as he agrees to carry. In this case the carrier's reward extends to no more y n is embraced in the Special acceptance & to any thing to wh his reward don't extend. he ant a com. car. and consequently ant liable as such. Esp 621. 2. Carth 485. Bull 70. 1. Tr Bl. 288. 2 East 134.

In the case in H Bl. y owner having concealed the value. y carrier was held not to be liable at all, but in that case there was a Special acceptance, by the terms of wh he was not liable. Carth 485. Esp 621. 4 East 371. & 5 East. 554. Esp 8. 622, 620.

A master of a stage coach who receives paymt for passengers only. & not for goods. is not liable as a Com. Car. tho if they are lost by his fault, he is liable. Com. R. 25. 1. Bac 343. 4. 2. Show 128. Salk. 282.

Tho a com car ant liable for more than his reward extends to. yet he is liable wtht actual paymt made beforehand. or wtht any Express promise of paymt. Because he may recover his hire upon a Quantum Meruit. he ant bound however to receive the goods wtht paymt. 1 Bac 343. 1. Selw 302. 2. Show 8. 129. Cro J. 262.

A notice of the Bailee limiting his liability but w in consequenus place, in his office, dispenses with the receipt of a Personal communication with the Bailor and wts give a Sufficient reason is presumed that the Bailor understood his terms.

To charge the Carrier it ant necessary that the goods be lost in transitu, or if they are lost at the Inn and before the delivery, he is clearly liable & if the goods are not delivered and are lost, he is liable, w he

[illegible] prove that the contracted carrier not to deliver but to report at the Inn. The new rule in Nine is clear & course fully delivering. nor he can show that he was not bound to deliver. 2 Bla. R 1150. 3 Mod 42. Cro 523. Bac 330. 1 R 34. 3 Ry 304. 3 Comyn R. 3. If the goods are directed to B. they are to be delivered. The carrier is liable till such delivery.

When the custom is for a carrier not to deliver the goods to the consignee but to keep them in store for him. He ant liable as a com carrier after they are deposited in the store. 4 T R 48. Cro 523. 2 John. 2.

But if he keeps them as a Depositary without a reward for the Storage. he will be liable as such. If he keeps them for a reward for the Storage, he will be liable as a hirer. and liable for want of ordinary care.

Does not the onus of carrying include the custody? And if so he wd be liable as Bailee of the third class.

If delivering goods on a dock. see 1 Selw. 302. 15 John. 39. 11. 157. 1 Selwn 304. 1 Bac 340. Owen 5. Lac 39. Geo 3d 2 Bla R 317. 5 T R. 395. 2. Com Contract. 2. 2.

If the consignee of goods directs to what carrier they shall be sent he and not the consignor will be entitled to the action. for he is the Bailor. 8 T R 333. Cro 5 T R. Bull 35. 3 Camd. 254.

Whenever the consignee makes himself liable for the onus of conveyance. & takes upon himself the risk he is entitled to the action even tho the consignor selects the carrier. 8 T R. 333. Cro R. 443. 52. Bull 35. 5 Bac or Bun 2680. 1 T R. 655. 1 Selw 313. n 5.

tho naming none in particular

If one sends an order for goods without naming a carrier & the vendor delivers them to the Carrier, they are at the

not of the vendee. 8 Co. 330. Cro 248. 3 Bac. 582. 2 Ramo 36. Selw. 312. 2 Johns. 232. Co. Dig. N. 42. not in the Eng Edition. m. 1 c. 8 or 2. 6 v. 1 y c.

When an action is brot vs the owner it must be brot vs all, when it is a promise. Salk. 440. Co 523. 5 Burr 2611. 14. 5 T R 651. 2 Selw. 192. 3 East 62. 76. 5 T R. 651. Selw 315. It is ex quasi contractu Secus if it sounds in Tort.

If the Non-order of the owner. 5 Burr 2611. 19. 2 B R. 94. 1 Saun. 291. b. see Pleadings.

By the Law. a postmaster was liable as a common carrier for letters money &c intrusted to y mail. for by the Law he was acting in a private capacity. But since the establishment of a general post office by Law. and the suppression of Private Posts. by St 12. Ch. 2. the Postmaster has ceased to be considered a Com Carrier. He enters into no ~~formal~~ contract with private individuals Salk 17. Ld Ray. 645. Cowp 754. 57. Jones 83. See Mas and Servant & action on the case.

Tis insensible to y character of a Com Carrier. that he sha receive hire from the individual who employs him. But a postmaster receives payment as an Agent for y government. & for their use. No one wd incur so great a responsibility as Postmasters wd, if they were liable as Common Carriers. From the nature of his character he ant liable to an individual for y default of his servants. They are y officers of y Law. He is liable as y individual injured for his own neglect & so are his subordinate officers liable for theirs, but no farther. 3 Mis 443. Cow or Com. 765. Jones 8.

Common carriers are said in the books to be liable, on y authority of y Salm. but this is totally unnecessary, for y custom

being universal, be part of the Law. 1. Ld Raym 45. 1. Bac 343.
Cro. 12. 1. 1. 33. 3 Mod 227. Jones 180. Hawkins 136.
Hardr 485. 6. The custom of the Realm is known to the Judges
"ex officio"
The general mode of declaring is assumpsit. 1. Selw 314.
5. 3 East 62. 4 Taunton 820.

When property is stolen from a common carrier or otherwise
lost so as to subject him, he being guilty of no misfeasance
the only remedy vs him is a Special action on the case,
He is liable on the ground of neglect. Trover wont lie
for there is no misfeasance: tho if he were guilty of
an actual misfeasance Trover wd lie 2 Salk 655.
8. Co 146. Holt 251. 5 Burr 2827. 5 Bac. 257. Cro 580. H.
90. He may at once make himself liable to both these
actions. Selw. 315. Park 49.

A Common carrier has a Lien upon the goods &c.
1 Ld Ray 752. ibid 867. 5 Bac. 209. 2. N Re. 64. 1. Selwn
311. ibid 107. 1. Esp N P. 109. 1 Dall 49.

Inkeepers 3. The general law as to Inkeepers will be considered
hereafter. but it is necessary here to treat of their Liability
as Bailees of guests goods Jones 133. 5 a. b.

A delivery of goods by an a guest agent to an Inkeeper.
comes to all under the 2d general division of the 5th
of Bailments.
A delivery of goods in this way is a bailment to
a person exercising a public authority employing for
a reward.

Epinasse states a delivery to an Innkeeper as a
Commodatum or lending gratis, but the two kinds
of delivery avoid resemble each other in any other way
than that they are both Bailments. A lending gratis
is a lending for the use of the Bailee only. and a borrower

considered as such. It always a private Bailee.
Ld 225. 6.

I. B. Classes this bailment under the 6th division
ie. a Mandatory.

A mandatory as such. is always a private Bailee,
he receives the goods to take care of them Gratis. But
an Innkeeper is always recompensed for his care.
It. he receives directly a price for keeping them. Even
for inanimate things he is rewarded by another gainful
contract: as Ish he is bound to entertain his guests.
The pay for a room. or chamber. has reference
to the the Storage. Bull 73. Jones 130. 2. 4.

The Bailment in this case being advantageous to both
parties, the Innkeeper not according to the Gen Principle
be liable for ordinary neglect, only. But the policy
of the Law has extended his liability somewhat farther.
It seems to be a prevailing opinion. that an Inn-
keepers liability is coextensive with that of a Com Car.
But I know of no express authority to that effect.
He is clearly liable for loss occasioned by Servants
in any way. The Law on this subject is intended
for the benefit of Travellers. they being in general
strangers to him. It therefore exposed to danger in losing
their goods. unless he were liable to them. 8 Co 32.3
Bull 73. 1. Bl 430. Jones 133. 4. S. a. b. Ld 2. 0. 0.

According to the General Rule. he is also liable, if
g. goods have been stolen by a stranger, an there
has been neglect or not. He ant excused here by
Ordinary care. as he wod be by the g. General principle.
Jones 134. Cro J. 184. 224. 8. Co 33. a. 87 R. 276. I G
thinks that the policy of g Law requires yt he shd
be liable as Com Carrier, tho he finds nothing to
this point.

This rule dont hold if the goods have been stolen

by the guest's own Servant, or by his travelling companion or by any other who Lodges in the room with him. by his own request. Cro Eliz 885. or 255. 8 Co 33. a. 3 Bac. 183. 285 Cro J. 525.

It wd seem Innkeepers are liable for losses occasioned by common robbery, tho' on this subject there dont seem to be any authorities that are conclusive. In Plow P. tis said that if the Inn be broken and the goods taken by the Kings enemies, y Innkeeper is excused. Now this seems to imply that he wd be liable for any other robbery.
In assigning a reason for this rule, it is said to be, yt such force is subtroned irresistable. The conclusion from the authorities it wd seem must be, that for a robbery committed by a small party, he wd be liable. But if it were by a large party, as by a Mob, or by Insurgents, he wd be excused. Hence it appears he ant liable to the extent of a common carrier. Jones 35. a. tho' the authorities ant conclusive. 8 Co 32. a. b. 3 Bac. 182. Cro J. 626. Quere P. C. Jones 35.

By the Roman Law nothing less than inevitable accident excused him & our Law is very much like it being deduced from it, almost word for word.

Jones. 182. a.

It wd seem that the Innkeeper ant liable, ni there is some default in himself, or his Servant. but yt ant law and tis expressly denied by J. Buller. 8. Co 33. Cro J. 526. 1 Str. 27.

The Innkeeper is liable only for such goods w are "Infra Hospitium" But this includes his outhouses and stables. 8. Co 33. b. Cro J. 626. 4 Marsh and Salk. 330.

If the goods of a guest are removed from an Inn, and lost, by his own direction, y Innkeeper is regularly not liable. As if a guest orders his horse to be sent

to a pasture wch is open & he is bitten, he is liable for his own fault, that I have not "infra Hospitium" Bull N.P. 73. 1 Roll 4. Cap 52. 8. C. 32. 3

It may be observed that if a guest sets his horse to be put into a pasture and he escapes, and is lost for want of a sufficient fence, the Inkeeper wd be liable on the grounds of ordinary neglect this not by the rule founded on policy.

If damage is done by the bailee's neglect, a bailor may sue him in assumpsit, on the express contract either express or implied: or in Tort for the neglect. 3 East 62. 1 Mies 282. 2 Esper 82.

But in this case neither debt nor trover will lie for there is no unlawful detainer or actual misfeasance.

6th Class of Bailments Mandatum.

A mandate, wch is a delivery of goods to be carried or some other act to be done to them without a reward. This species of Bailment is sometime called "acting on commission" but the expression is grossly improper and the proper name is mandate. The carrying is gratuitous, the difference between this and a deposit, is, the one is to do some act, and the other to keep some article. Bull N.P. 73. 1 Roll 254. Ld Ray 918. Bull N.P. 73.

A Bailment of this kind being wholly advantageous to the Bailor only, the Bailee is liable according to the general principle, for nothing less, in gross neglect, and such is the Law. Ld Ray. 909. 1 Y. 1 Str 86. 1 Roll 8. 253. 4. There are some qualifications.

But where there is an express agreement by the bailee to use more care, care required in principle, and the loss happens by the omission of that care, wch he agreed to exercise, he is clearly liable. But this on account of

in his own account for which he had made for gross neglect. Ford and Jones 3. 1 Pro 55. & 255. La Ray 2.9. 1 Lt Ra. 151. 2.

Such an agreement to use all necessary care and skill may in certain cases be implied but under what circumstances will be considered here Pro.

An agreement then of this sort will subject the Bailee to less than gross neglect according to the agreement. 1 Lt Ra. 158. The omission of the stipulated care will be considered as gross neglect Pecus if he don't stipulate for extraordinary care.

Indeed the agreement alluded to goes to compound all distinctions of care. If such doctrine be correct all the rules wd be absurd. This seems to be the opinion of Lord Hell. 1 Lt Ra. 158. 1 Pro. 255. Jones 35. La Ray 3.1. Q. contra is so doctrine.

And an agreement of a mandatory to use all skill and care, and implied in the bailment in the act to be done is in the line of his profession and business. 1 Ld Ra 158. Jones, 139. 140
11. Ld 54. 1 Launa 324. Wis 5. 58.
This seems to be the true rule, But Jones says this Bailment from the nature of it implies this agreement. Not supported by authority. 3 Bro. 165. 1. Lt Ra 158. 11. Ld. 54. 1. Launa. 324. Wis 611. Jones 34. 5 East Edwards. 8.

Jones maintains a distinction between the duty of a Bailee when to a mere bearance & performing some act and when it lies in keeping and carrying only. By bearance he means labour. He says that when the Bailee comes without reward, he don't impliedly promise to use all care and skill. Jones 1. 3.4. 6. 70. 72.

He says that when a Bailee undertakes to do any other act as to unload a Ship for Example, he

impliedly engages to use all necessary care and skill
Jones. 143. 4. An unfounded distinction S.C. Ld Bk 258.
true reason.
But where there is no engagement, express or implied,
to use all care and skill, the bailee is liable for
gross neglect only. Jones 14. 1. Pow 255.

If a merchant engages to enter at the Custom house, goods
of Bar. with his own, and he do it gratuitously, he did it,
but made a wrong denomination, in consequence of which
they were forfeited. It was held not liable, but his own
goods were lost in the same amb. and therefore there was
evidently no fraud. 1. Ld Bk 158. 1 Pow 255. 3 Bk. 185
2. Jones. 149. 50. Cro 601.

Jones agreed that a carriment to convey goods,
doth imply a contract to use all necessary care and
skill. Jones 72. 87.

It has been observed, that the Law implies an engagement,
to use all necessary care and skill, on the part of the
bailee, where the act to be done is in the line of
his profession or business: but this implied agreement extends
only to the clearance or the doing of the act, and no further.
There is no implied agreement to use all care and skill
in keeping it, for if the goods shd be lost, the bailee
shd be liable only for gross neglect. This a tailor
engages to make a garment fit. the Law implies
an agreement to do the work skillfully but not to keep it safe
2d Ray 918. 1 Bull 33. 1 Pow 255. 1 Bull 73.

Even an express agreement by the bailee to use all
necessary care and skill, will not subject him for losses
occasioned by the acts of God, of public enemies, or
of the Bailor. 2d Ray 918. 11.

But it shd seem in principle that a Bailee, cannot
even by express agreement, exempt himself from losses occasioned

of his own fault or default. In contra Bonos mores, ergo
in Law. Jones 88. 75.

It has been observed that according to some authorities,
omission of stipulated care, is gross neglect.
This was disagreed to. But an it be true or not,
on the delivery of the bailee, of delivery binds him as a
contract. So that after the goods are delivered to a
Mandatory, of engagement in his said Business is stipulated,
binds him as a contract. But he ant bound before
delivery. If P promise to build a house for a man,
and at the same time refuse to do it, he cannot compel
me, for his a nudum pactum. So if P promise to carry
goods for A B. and at of same time refuse to take them,
I am not liable. but after having taken them, I shall
certainly be bound to carry them. Ld Ray 920. 5 T R. 143.
Cro J. 667. 800 and Cro Eliz. 12 Co. 1. Cro E. 364 Ld Ray 909. 11.
12. mod 48. Yelv 4. 128. Marr Ev. 207. 1 Esp R 74.

"Insurance" 46.

"Action on the case." 7.

The opinions are not all concordant on this point.
But besides the above authorities, there is a Judicial decision
directly in point. Viz. A delivered money to B. and B
promised to return it on demand to A. A recovered of B in
assumpsit. Yelv 128. Cro J. 667. 8. 12. Mod 48.

Jones says the liability of the Bailee is founded on his
gross neglect. and not on the promise. Ld Ray 909.
1. East 87. 5 T R. 40. 9 55.

Powel says (75. 80) that where Special damages accrue
on account of the bailee's not taking the goods according
to the agreement, an action will lie, tho' contract is
gratuitous. and this, he says, is because of the Special damages.
The damage must accrue, if at all, on the breach of
contract. but this wd be "damnum absque injuria"
The question of damage cannot arise, till the question of
contract has been settled. And be beginning at the
Tail end. for wd be useless to the bailee's right to
damages, before his ascertained, an the action will lie.

4 John 84.

Besides, the case wh Jones supposes, would not support damages, even if the action. Not Law. 4 Burr 84.

On the other hand when the goods have been delivered, special damages aint necessary to support the action. The Law presumes damage, where there has been a breach of contract. Ld Ray 909. 10. B. 20.

It is said, that an action on a Mandatory, (his undertaking being gratuitous,) is founded upon his neglect, and not upon his promise Express or Implied. If this is the case, how can an Express promise extend his liability? Jones. 86. 1. Roll 10. He may surely make himself an insurer vs all risks: but if his expromise wd not bind him as such, how can he become more liable by any promise, than without one? There is no foundation for this opinion. Jones cites Roll. but its doubtful an he supports his position. It seems to be the point of all the authorities, that he is liable on the promise. Jones. 86. or 56. Contra. Ld Ray. 200. 10. 3 Te. 140. 9. 5t. 3 East 52.

General Rules of Trover.

A Trover is understood to be a direct claim or encumbrance upon some specific property of another, as security for some debt or duty, and accompanied with possession. If the definition is correct, it wd seem that a Trover would only in favour of Bailees of the 5th class, and not of the fourth class. Do not all of the 5th. It is true that a Pledgee has a right to detain the goods, but this aint a Trover. It is a specific property, not an incumbrance to secure a debt. Yelv 17, 8 Salk 522. Cob L. 583. Fre Ney 416. Cro J. 245.

In the case of a depositary & Mandatory, there can obviously be no Trover. The Bailee may countermand the delivery whenever he chooses. Cro 538.

A Bailee of the 4th kind, (hirers) has a Trover on the case

So a Beam, a lien is created by the delivery, for that the property of act of the delivery. Cro. E. 244. S. Yelv 176. Salk 522. Pre Ley. 48.

Most bailees of the 5th kind, have also a lien, i.e. a right to hold the goods entrusted to them as security to them for their hire or reward. But this ain't my case of an bailee of the 4th. 3 Bac 185. Feb 42. This lien is created by a condition in Law.

A person who obtains possession of the goods from the bailee wrongfully, has no claim to this lien, 3 Ewe 585. 2 E. R. 485. Salk 654.

A common carrier has a lien till his hire is paid, Ld Ray 182. 80. 5 Burr 2820. 2 W. R. 64. Contra Ld Raymond 80. Not Law.

And to land down by Ld Holt, that if goods are stolen, and delivered to a Com Carrier, my latter may detain them from the owner, till his reward for my carriage of them, is paid. for as a Com Carrier he is bound to receive them. Ld Ray. 5. 6. 80.

An Innkeeper may detain the person of his guest, for the payment of his bill, viz. for horse. Self. N. he has a lien upon his person, for he is bound to receive him. 3 Bac 185. 2 Roll 55. 1. Show 26.

He may also detain the horse of his guest, till his keeping is paid for. But the horse cannot be detained for my payment of the guest entertainment. The owner however may be detained till the whole is paid. 5 Bac 26. Ld Ray. 808. Bull 45. 8. Co 147. Salk 388. Esp 584.

And an inkeeper may detain my horse, even tho' brot by a person not the true owner, and he may detain him, vs

he was owner, till his keeping is paid for. It will
his business to know the true owner, and to satisfy that
the horse has been kept in his possession. Cro. Eliz. 7.
3 Bac Ab. 6. Popham 128. pl. 3. Cro 184. 1 Roll Ab. 1 Show. 263.

But the Inn keeper loses his Lien by voluntarily permitting
the horse to go out of his possession. Indeed that is
a rule with regard to all Liens upon Personal property.
Possession is essential to all such Liens. A lien is
a right to detain and necessarily supposes so that what
is already in his possession. Str 585. Cro. 584. 1 Bac. 403. 4.
1. East 4.

Most private bailees of the 5th class have also a Lien.
a tailor or other mechanic to whom goods are
delivered to be wrought, has a Lien till a bill for so
doing is paid. It is true that he is not bound to receive
the goods, and his lien therefore cannot be founded
on that principle. It is said to exist for the promotion
of Trade. However the Tailor is in the habit of trusting
the Bailor, he ought not to detain without giving notice
for he is presumed to have done the work on the Personal
credit of the Bailor. 8. Co 147. 1. Bac 240. n. Hob. 42.
Cro. 7. 6.

On the other hand an agisting Farmer cannot detain
a property committed to him, till paid. It will be cause
he not bound to receive them & 2d The Interest of
Trade and commerce, not affected by it. Cro 585.
Bull Ab. Co Ch. Cy. 1. Bac 240. n.

The Captain of a Ship has no Lien upon her for his wages,
and Stores, for he is deemed to trust to the personal
credit of the owners. If he had a lien, he might make
a very improper use. to the great injury of the owners.
as he might keep her in a foreign country to enforce his
Lien, till the became rotten. Park 33. Doug 9. Ld Ray. 632. Str.

12. Mod. 440. Abbot on Shipping 142. 400. 1. Salk 143. 3 Ep 632. 5. 6.

The mariners however have a lien upon her, for they are supposed to contract upon the credit of the ship and there is no damage to the ship to be apprehended from it, or they may libel the ship even in a foreign court of Admiralty and have her condemned and sold for their wages. The master has generally the power to pay them off. He is the person to whom they are to look for wages. Abbot 402. Ep 234.

In all cases in wh there is a special express reason why a carter relies for his reward, he has no Lien. So has been decided in the case of a farmer, who carries a right to detain a horse, until paid for his care. Not an express promise on the part of the owner to pay a certain sum for the care, would give the right to detain, because it was said that the farmer relied on the express grant. If it comes within the "express fact concerning the thing". Cro 69. 5 Bac 471. 2 Roll. Ab. Ep 588. 6. Not Law.
Sure Great Rep. 471. 2 Mass 245. Hutton v Bray. 3 Salk. 1 P. 471. 1 J. denied.

A Factor has a Lien on the goods in his hands. Master and Servant. 2 T. R. Com. Thereth B. Ames 254. 1. Bac or Burr 394. 434. 2 Ab. R. 454. Ep 108. "Master and Servant Title Agent. 24"

With regard to other Bailees, than those of the 4th and 5th classes. tho they all have a special interest, some greater and some lower. Yet none of them have a Lien. There is nothing to be secured for they are entitled to nothing. 1 Roll 128. 1 Bac 240th Cro. 17.

* They have a right to detain according to agr and

No 3 Bailments. Omit this side and turn over.

It has been observed, yt if the bailee is insolvent, his creditors will not hold, wn the bailees possn was such as gave him a false credit. And it may also be added, yt y property must also be in his order & disposition. And tho' the Bailee is insolvent, with ye appearance of ownership, y creditor cannot hold vs the Bailor: wn the terms of the Bailmt enabled the Baile to hold and appear as the true owner. This was settled in the following case. A deposited w a pledge with a pawnbroker. a sealed bag o Seals, and he being insolvent disposed of them to third persons, y bailor was allowed to recover them of the 3d persons. The Pawnbroker had no right by the terms of the bailmt to treat y goods as his own. The breaking of y Seals was clearly a violation of his Trust. 1 Salk. 85. 3 Ind 44 1 Bet P 82. 88. 548. Doug 306. 7 T R 5. 25. 1 Ves 244. Cowp 33 L. 234. 243.

This case will illustrate the rule yt the bailment must not only have the appearance of ownership but he must with the consent of y owner, have the order and disposition. If goods are left with a repository and he becomes insolvent and sell them, y purchaser cannot hold them as can the creditors to Bailee hold them vs Reuter 3 Salk 44

So also if goods are left by the purchaser in the possession, possn of the vendor, for a particular, reasonable or necessary bad purpose, and the vendor becomes Insolvent, neither the creditors or purchasers can hold vs the owner. Brown vs Pennington. Comyn.

It has also been determined in Comyn. that where one person lets a cow, to another. If the bailee becomes insolvent

This is mortgaged.

If one man takes, by mistake, another's goods, he said that the bailee must deliver the property to the bailor, according to the terms of the contract. Because it said that the Bailee cannot know the ownership of the person in contract. 1 Bac 227. 1 Roll 606. 1 Bac 242.

The ground of the rule is, that if a bailee the goods of B to P. P is obliged to deliver the goods back, to B. But it seems unaccountable that he should be liable to the Bailor, if he delivers the goods to the true owner. In the rule abstract it means, that the bailee will be justified in delivering the goods back to the Bailor. The rule should be expressed thus, that he may instead of, he must. 1 Roll 607. 1 Bac 242. 1 T. R. 87.

That such is the rule abstract from a rule given afterwards viz that if the bailee redelivers the goods to the bailor pending an action vs Bailee by the owner, such redelivery will bar the action. It is evident from this, that he will be justified in the delivery to the Bailor and not that he must deliver to him.

"The true owner may claim the goods wherever he finds them, in Market Overt."

This explanation seems to be grounded on the Rule. That if a stolen goods in a com Carrier, is taken and bought in market overt, the owner's reward is bard. But he must give them up to the true owner, a forfeit a private one is must. 2 Ld Raym 87. 1 Bac 227. 1 Roll 607.

It seems that in such case, if the bailee dies, and his Ext comes into poss.n of the goods. he must deliver them to the true owner at his peril.
He can't discharge himself by a delivery to the Bailor, who not the owner. The reason given is, that the Ext having come into poss.n by act of Law, he is bound to deliver them to him, who is by Law entitled to the

posn. the Ca. not being bound to the personal trust of the Testator. This reason is very technical and I doubt very much an he wd not be justified, if he delivered them to the Bailor. 1 Roll 60. 1 Bac 3.

In pursuing the subject of how far the rights of Strangers are effected, it is necessary to consider the rights of Bailees creditors, who levy upon the property supposing it to be his. and of purchasers, who purchased under the same circumstances. a very important part of ye Title.

The Law in ye subject is in a great measure regulated by the St 21. Jam. 1. wh is in affirmance of ye Com Law.

By this St. it is provided yt if where a person becomes a Bankrupt, he has in his posn by order and disposition of ye ownr of another, with the consent of the owner, these goods are liable to be taken for his debts and may be seized upon by any of his creditors. Thus if the purchaser of a stock of goods, puts them into the posn of B. to trade with as his own. and B becomes a bankrupt, these goods are liable for his debts. Alk 160. 1 Ld 342. Long 313. 7 T R 228. 8 T R 82. Gilb 056. 1 Bet P. 82. It gives the vendee or bailee a false credit.

This provision of the St is founded on the abuse herein of false credit with ye Public. It is thought more reasonable yt ye Bailor who has enabled ye bailee to occasion the loss. shd suffer. than those who trusted to the credit wh ye conduct of ye Bailor had created. 2 T R 70.

The St however relates only to ye case of bankrupt bailees. With regard to Solvent Bailees, there is no need of any provision. for if they have goods of their own, assignees dont require those of bailees property, shd be liable. 2 T R. 5.

it extends to all cases where the goods of one person are in any manner in the posst. under a disposition of the Bailee with y owners consent, so that it extends to goods, wch didnt belong to him originally as well as those wch did. Coup 232. 1. Bac Ab. 82. Esp 566.

It is well to observe that as to goods originally belonging to the Bailee if he him sold, but permitted by the purchaser to remain in his posst, the was as strong before y. It as it is now. Such a conveyance wd have been fraudulent and consequently void by the St. 13 Eliz. 3 Co 81. Coup 233. 2 T R 88. 2 Vs 387 Bs. 71.

And also y creditors of y Bailee are allowed to come on the goods in his posst not wholly on the ground of fraud inter Bailor and Bailee. but on the ground of false credit. 1. Bac 562. 3 Ed. Esp. 566.

And further y rebutting of a presumption of fraud. inter Bailor and Bailee will avail nothing to the bailor. as between him and the creditor 1. Sev 308. 1. Atky. 180.3.

But the St dont extend to goods possessed by Bankrupt in the right of another. as if an Exr shd become a Bankrupt. being in the posst of the property of the deceased. That property ant liable. It ant the fault of Representatives yt he holds y goods. for he holds them by Law. and they cannot prevent it. 1 Salk 82. 302. 1. Atk 10. 3 P. Wms 18. in 3 T R. 515.

The St however, dont extend as well to mortgaged Lands, as to absolute Sales. when the vendor remains in posst and it may be asked why are not mortgaged Lands likewise subjected? The reason is, the Law dont hold y posst of Lands to be proof of ownership. & the ownership of Lands can also be proved by title deeds. But there

can be no such proof of ye ownership of Personal property. Possn of Personal property, especially with the order and disposition of it, is the best Evi of Title. 1. Atk. 165. 1. Ver 348. 1. Mis 200. 1. Selw 159. 20. Rob. 545. 57. 1 Ver 244. or 348. Wms. 566.

The St doth extend to ye sale of a ship at sea, by the owner on Land: for here immediate possn cannot be given to the vendee, and therefore it ant ye fault of either party yt the property remains in the possn of the vendor. 1. Atk. 160 Rob. 545. 51. & Vide. 402. 485. 491. 1 Ver 361. 2. 3. Wms. 566. 8.

But in this case ye vendee of ye Ship must take possn of her in her return as soon as may be, otherwise shd the vendor become bankrupt, the ship shd be liable to be taken by the creditors. 1. Ver 350. 2 Vez 450. 402. 491. Esp 50. 5. 1. Atk 160.

But there are cases where ye actual delivery of ye good, ant necessary under special circumstances, as where goods are kept in a store, here delivery of the key of the store is a sufficient delivery. 1 Vez 51. 2 Ves 450. Esp 57. This is called a Symbolical delivery, improperly.

In giving a case within the St, ye goods must be received by the Bankrupt Bailee as his own goods, are and this with ye consent of the owner.

They must not only be left in his possn but also in his order and disposition Here possn ant sales.
If A let B a horse to go a Journey, and B is a bankrupt, ye horse ant liable for his debts. It cannot be taken for his debts. There ant sale, but of ownership according to common experience - as tis common, very much so Esp 567. 70. for men to use other Man their own horses. Ind be 30 £ 31b. secur, if he kept the horse for one or 2. yrs. Cowp 223. 1 Atk 185.

For the same reason, a temporary posn for a particular and necessary purpose, to be answered for, y Bailor, will not make y goods liable, if the Bailee becomes a bankrupt. Each a case arises within either of the Sts. the bankrupt Bailee must appear in all respects to be the true owner. 1 Selw. Ny. 200. 1 Atks 65. Cowp 86, 90. [illegible] case will be —

If from the nature of his business, y presumption of his ownership is concluded, y true owner shall hold y goods in preference to the creditors. Thus if a Factor known to be such, becomes Bankrupt, y goods of his principal are liable for his debts, he being known to be a Factor. The posn of the goods gives no false credit to him. 1. B & P. 32. 1 P. Wm 318. 3 Ord 135. Cowp 57. So of Goldsmiths & private Bankers in Eng.

These 2 Sts are intended for the benefit of the bailee, creditors & with purchasers, have no concern, but as it is in affirmance of the C Law, it will be needless to treat of it.

In common cases, [illegible] Bailee [illegible] the St. Bailor [illegible] the Bailee as a reputed Bailee as a creditor [illegible] y goods as being Bailee, [illegible] in the vendee case of a Sale in a Market Overt, by the Bailee. As to all these matters, "Caveat Emptor applies" 1 Wils 81 Sts 114. 3 Atks. 414. Salk 283. Cowp 599. 5 Bac 200. 2 T R 3, 6. 4 Ford 644. Moore vs Barker a leading case

The rule is the same as to Bailor as if y property were taken from him wrongfully.

But there is an exception to the Rule, when the property bailed is money or bank bills, or any circulating medium, transferable by delivery. Here a bona fide

sanofe. bind the Bailee and a bona fide recovery will hold as the owner. So is the rule the the money be taken wrongfully and cannot be identified. This rule is founded on Commercial policy.
Salk 126. 1 Burr 452. 8. 3 ibid 15. 16. 1. B R. 285.
Cro. 39-580. 5 J. "Inder 52 or 62. 42.

Under the Statute a creditor of the Bailee who seize the property as his, cannot hold as the Bailor in any case, in the bailee is bankrupt.

So in Comnt. however strong the appearance of ownership may have been: for if the bailee is Solvent, a creditor may have his remedy. So also of a purchaser, for he may have his remedy as the Bailee on his implied warranty of Title.

It has been observed that if the bailee is Insolvent his creditors will not hold in the bailee, tho' he was such, as gave him a false credit and it may be added yet the property must be in his own disposition and order.
And tho the bailee is Insolvent with all y appearance of ownership, y creditors cannot hold as the Bailor. in y terms of y bailmt enabled the Bailee to hold and appear as the true owner. This was settled in y following case. A deposited as a pledge with a pawnbroker, a sealed bag of Jewels, and he being Insolvent disposed of y in to 3d persons. y bailor was allowed to recover them of the 3d persons. The pawnbroker has no right by the terms of the bailmt to treat these goods as his own. The breaking of the seal was clearly a violation of the trust.
ni.

1 Sid. 246. 3 Mk. 44. 1 Str. 505. Doug. 380. Cro. Eliz. 580. 1 B. & P. 282. 88. 648. 1 J. & S. 23.

This case will illustrate y rule that the bailmt must not only have the appearance of ownership but yet he must with y consent of the owner, have y

order and disposition. If then goods are left with a depositary and he becomes Insolvent and sell them, the purchaser cannot hold them nor can the creditor to Bailee hold them vs Bailor. 3 Atks 44.

Doug 103. 1 Term 55. Cro Eliz 86.

So also if goods are left by the purchaser in the contemporaneous poss.n of the vendor for a particular, reasonable or necessary purpose, and the vendor becomes Insolvent, neither the creditors nor purchasers can hold vs the owner. Brown vs Anderson. Ermt.

It has also been determined in Ermt that where one person lets a cow to another, if the bailee becomes insolvent, the creditors or purchasers, cannot hold as Bailor, for it being a very customary thing, the poss.n ant as satisfactory proof of ownership or a rule of Policy supposes thus - otherwise this species of bailment wd be discouraged and tis a very useful one.

A purchaser of beef cattle for the States of N.Y. commanded them to a certain drover, to drove them to N.J. and the drover brot them to his own farm and sold them & now held that the purchaser could not hold them, because the mere fact of drowing them, is a very slight or no proof at all of ownership.

It seems to be a question not precisely settled in the books, how if goods are taken for hire, to be used by the bailee for a certain time, the creditors, or creditors upon becoming Insolvent, can take the use of them for the time of the Bailment. The better opinion seems to be that the purchaser cannot and that it cannot be taken in Exn Com D. Co. 8. 5. 4. 1 Mod 210. Salk 454.

2d Ray 1305. 13. 15. 18. 0 Mod 223. 11. Ds 5.

The principle on wh this is founded is, it is a personal Trust in the Bailee and he can't transmit upon it during the term. The general principle relating to the

assignment of a bond. apply equally well here.
8 Mod 004. 1 Sa. East 6. 1 Bac 303. 1. Mod 210. 7. T. R.
11. 12. Said he can. but not the better opinion. 6 Mod 223.

Upon reading the case in 7 T.R. it will appear that y opinion of Ld King was in favour of admitting such a bailment to be taken But when considered with regard to the subject matter, his opinion will seem to be secure.

Tis a General Rule yt the Bailee having a General property, may maintain Trespass, Trover or any proper action vs any person who takes, away or injures the goods in the posn of y bailee. 5 Bac 164. 260. 1 Stile 4
Lech 214. 3 Reeves Eng Law. 292. 2 Bulst. 208
"Trover 55"
And y rule will hold even tho y bailee never had y actual possn it. y right of possn The terms "constructive possn" & possn in Law are synonymous. and mean y right of present possn. Thus if a maker a bill of sale of goods to B. & B leaves them in the possn of A. and a stranger takes them away. B may recover them from the stranger: for the bill of sale gives him the property.

Tis a rule in Law that he who has y interest in things personal, has of course y constructive possn, nie it has been transferred by his own act, or by operation of Law. tho y goods may be in y hands of another.
Lech 214. 2 Roll 566. 1 Sid 438. (Secus if he hath y right of immediate possn.)

But if y goods are pawned or bailed for hire, to be used for a certain time by the Bailee: y bailee cannot maintain any action vs a wrongdoer. for taking or injuring them during that time; for to maintain Trover or Trespass. y Plff must have y actual or constructive possn at y time where y injury was done. But here he

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had neither. 1. Ch. R. 1. Ibid 480. 4 Ibid 420. 8 John 432 - Esp 383. Esp D 570. 1 Inst 108. 4 T R 489.

What then is the remedy of a Bailor? In answer, yet after the time of bailment has expired, he may bring this action on the wrongdoer. But it must be for the subsequent detention. If he cd have bro't it during the term he must have had a right of poss^n. It happens that he cd also have a right of recaption during the term, nor wd it be inconsistent with the rights of a bailee. During the term a bailee has a right of action. But as the detainer after the term a bailor has a right of action. As trover is founded in property, why may he not have an action? Because he hath no possessory for the time. But it is said that he may maintain a special action on the case for an injury to the Reversion. 1. Ch. R. 167. 2 Ibid 329. n.

If the property be actually be destroyed by the wrongdoer during the term a bailee may sue the wrongdoer, or satisfy the Bailor but if he refuse to sue or lend his name to the Bailor, in order that he may sue, a Ct of Eq will compel him to lend it.

Goods belonging to A. are in the poss^n of A. A gives them to B for parol, right delivery. and a stranger takes them away or injures them, while in A's poss^n. B cant have an action to the wrongdoer. A has neither the actual or constructive poss^n. for a parol gift, with delivery dont convey a right of poss^n. 2 Str 1155. 1 Bac. 140. Esp 377.

But a delivery to the donee's servant or to any one appointed to receive them, by the donee's order or direction, is in law a delivery to himself. Cowp 294.

"Ld J." 14.

3.

If a bailee delivers the goods to a stranger the bailor cannot maintain trover against the stranger, or recovering the goods, nor in the first instance, trover out upon demand by the Bailor and refused. & Bailor have trover vs him. 5 Bac 164. 201. 1. Ab 241. 23. 1. Roll 95. Ld Raym 867. Stein 15.

Bailee

On the other hand, most bailees and it will seem every bailee, may maintain an action for the full value vs any wrongdoer, who takes the goods from him or injures them while in his posn. As a bailee & all clearly in the first. There is no doubt in any of the books respecting this right. 5 Bac 162. 262. Bull 33. Ld Raym 276. Salk. 143. 1 Mod 31. Cro Eliz 577.

A finder may recover vs a stranger who takes the goods away wrongfully & injures them in his posn for vs the true owner, he has a right of posn. Ser 585. Bull 33. Cro Eliz 577. 1 Comb 204. Cathorion & depositary may.

The ground of a bailee right to sue a stranger is said to be his own liability over to the bailor. It has therefore been doubted, an a depositary under a general acceptance, can ever maintain an action an action vs a wrongdoer. Because he said he is liable only for his own fraud to the Bailor. 5 Bac 164. 262. 1. Inc. 98. 1. Sell 348. 438. 13. Co 68. Cro Eliz 32. 92. Ld Raym 3. 2. 8. 5 Bac 240. 1 Ves Jun 2

This conclusion seems to be wholly unauthorized. First because the Bailee liability aint the ground of his right of action. and 2d if it was, he wd have still his right of action. It wd seem that on the ground of his having a Special property, he has this right. It admits of no doubt that he has the Special property. He has a right of posn vs all persons but the owner. Jones 112.

7. C. & 332. 5. 1 Buc 20. 10 Eig 87. Str 505. Comb 264.
It is absurd to say that he has a right of poss.n, without
admitting a remedy vs them & those who injure him
in the poss.n.

It is established yt a finder has a right of action vs
a wrongdoer. If then he is entitled to y action when
in poss.n without the consent of the owner, a fortiori
the depositary is, who has poss.n with the owner's
consent. But it never was contended that y ground
of y foundn right to the action was his liability
over to the owner. Str 505. 5 Buc 362. Comb. 264.

A still stronger case analagous is, yt a Servant
robbed of his master's goods, may maintain an action
vs the hundred. on the St of Winton.

But it universally agreed that he is not liable
to his master. The ground of his right is clearly
the Lawful poss.n wh he has. 4 Mod 404. Com Rep.
627. Com. 203. 12. Mod 54. 3 Co 59. 13 Co 69.
2 Saunds 380. 3 Co 69.

An uncertificated Bankrupt after having acquired goods,
after his bankruptcy, may have Trover vs a Wrongdoer,
nine rule contend that his right arose from his
liability over to his assignees, & yet he is a mere
depositary of the goods for the assignees. 1. W. Bl. 44. Doug. 455.

In an action by bailee vs a wrongdoer, the bailees
liability over to Bailor can't be tried - no such thing
as trying 2 Issues. Policy also demands it.

It seems then to be clearly proved by analogy,
that the ground of the bailees right of action
vs a wrongdoer, is not his liability over to his Bailor.

It is said that a special property alone is required to give a right of action vs a wrongdoer. Bull 33. Esp. N.P. 505. Str 505.

But to come to what established the doctrine "idem robs" Sir said down by B R. that mere daufe poss^n, is sufficient to give a right of action vs a wrongdoer. 1 TR. 334.

Even if the bailee liability over to the Bailor is in every instance a ground of a claim vs a wrongdoer. still a depositary has the right of action. He may be liable, he is accountable for goods, and may be subjected for loss or damage. This proves that on this principle, a depositary is entitled to a action. It cannot be known whether he is liable or not. before proof. and an he is liable or not cannot be tried in an action vs the wrongdoer. by the bailee. There is then no distinction, between a depositary and other Bailees, as the right of action vs a wrongdoer. All bailees may therefore maintain an action for the full value vs a wrongdoer.

If a bailee delivers goods to a Stranger, the latter may have an action vs any third person. who violates his poss^n. For he has a Special property. an actual poss^n. and therefore a right of poss^n. 5 Bac 206. 1. Ord 242. 1 Roll 607.
This rule ought to be observed. both on account of its intrinsic importance and its relevancy to the Case discussed.

Note

An auctioner or Broker may maintain an action, in his own name, on a contract for goods sold, vs the buyer. and this he may do. tho' the goods were known to belong to another. Now he acts only as a

Servant to the owner, but he has a right to ye action his said, because he has a beneficial interest in the Sale, and because the contract is in his own name. The one reason wh he is allowed the action, is not that he has an interest arising from his commission, but because the contract is in his own name. 1. H. Bl. 81. 2 Ord 391. 2. 1. Chitty 5. Bull 130. A Fortiori a Factor is entitled to maintain an action in his own name.

Servant and Master.

So also the master of a ship may maintain an action in his own name, for the freight. Reason the contract is in his own name. Park 403. 1. H. Bl 82. Bull 130.

It will be perceived already laid down that in many cases, an action may be brot vs the wrongdoer for the full value, either by the Bailor or ye Bailee But there be only one action for the full value. A recovery in favour of either will bar an action brot by the other. 1. Bac 100. 263. 13. Co 69.

And tho the Bailor may recover the full value, still the Bailee may recover for his Special damages. For the recovery of the Bailor is no compensation to the bailee for the damages he may have sustained.

It is laid down in Roll 96 if the bailor and bailee both sue, he who recovers first, shall oust the other of his action, i.e. the first recovery may be pleaded in bar to the 2d action. 2 Role 100. 8. rep. 22.

But it wd seem that the more commencing an action by one of ye m, ousts the other of his action of that same nature and yet the actions cannot proceed together, and the parties share for the first recovery.

He who sues first, entitles himself to recover according to all analogies: As in the case of action by Master & Servant. for the same thing. 3 Bac 35E. or 55E. Each 12d.

So also in case of an Escape where a Pltff in the process commences an action. he defeats the right of the Shff. this Sitter might have commenced an action. 3 Co 44. C. 2 Str 8. 3. 1. Tell 608. Cro E. 605.

If the bailor sues and recovers of the wrongdoer, he can maintain no action vs the Bailee. for he is entitled to but one satisfaction. Ld Ray 1217. Cro. E. 24. 35. Lev. 124. Salk 11. Gilb 319. Yelv. 68

And it wd seem that if the Bailor first commences a Suit vs the wrongdoer, he by that waives his right of action vs the Bailee. He had 2 remedies, but by that he made his election and is bound by it. There is however no direct authority to this effect, but there is the strongest analogy to support it.

If in the case of a Rescue and Escape a Pltff in a process sues the rescuer. Qe the Shff is "pro tanto" discharged. Ed 600. 12. Cro Ca. 9. or 10. Stuart 78

If the Bailee sues first for the full value he makes himself liable at all events to the Bailor. I do not decide to support this Rule, correct on principle. if it be true yet Bailee commencing an action ousts the Bailor's right. Hence he wd have no opportunity to seek his remedy.

If the Bailor takes the property from the Bailee before his special interest therein is determined, yet Bailee

may maintain a Special action on the case, as here, for in such case the Bailee is a wrongdoer. 5 Bac 185. 266. 2 Ld. R. 65. Bailee may recover for Special injury.

But an the Bailee in this case can maintain trover, or trespass, is a very difficult question. The Bailee's special property is the ground of his right of action. but this wd seem confer a right of action for the full and only vs Strangers. The goods as between Bailor and Bailee ant the bailor's. He has only a Special property in them. 1. Bac 241. Ew. 401. 3 T. R. 510. 5 Bac 185. 2. 58.

On this ground it appears that the bailee ant entitled to Trover or Trespass vs the Bailor. But tis said in Coke yt the bailee may maintain trover or trespass vs the Bailor and that bailor's ownership appearing in Evi shall go in mitigation of damages. 13. Co 69.

In all cases, where damages are merely mitigated the Pltff has "prima facie" a right to recover, the whole value of the property but the Bailee in this action vs the Bailor has not even "prima facie" to the whole value. Besides the value of the property is no Rule of damages whatever in this case. and hence it wd seem. that the Bailee cannot have an action vs the Bailor, wh in its structure is for the whole value.

If the damage sustained by the Bailee is greater than the whole value of the property bailed, can the damage be aggravated? The damage sustained may be much greater or less than the value of the property bailed and such damage is the ground of action. but it cannot be measured by the value and ergo we may conclude that a Special action on the case

is the only proper action in this case.

If the bailee delivers the goods to another contrary to the Bailor's order, y Bailee is "in fault" guilty of a conversion and y Bailor may maintain Trover, with demand. Ro 581. 4 Ro 208 or 260.

As to y form of action wh the Bailor may maintain vs the Bailee, y General Rule is that he can maintain no other action than Detinue or some other action on the case, Trover for the conversion promise to return, or assumsit, according to the nature. 1 Bac 237 &c. Cro J. 224. Cro Eliz 784. 781. Bull 72.

When the Bailor is injured by the neglect of the Bailee, the former may sue either in assumsit upon the contract express or implied or in tort for the Neglect. 3. East 62 1. Mich 282. 2 ibid 314. 219.

The general Rule then is, that Trespass will not lie vs Bailee in favour of the Bailor, because his poss. is lawful and has been guilty of no unlawful taking. 8 Co 146. Perk 5. 121. 8 Co 146 or 46.

There is an Exception to the Rule where y bailee willfully destroys the goods, for this act extinguishes the Bailment and destroys his character as Bailee. Co Litt 57. a. 1. Ins. 57. a. 5 Co B. v. Moor 241. 2 Roll 555. 2 Ro 400. 3 Atk 46. Contra 5 Bac. 260. Here Trespass will lie. Perkins.

The destruction to ground the action of Trespass upon it must be voluntary on the part of y Bailee, for if y goods are lost by accident or neglect, Trespass will not lie.

Inns.

Inn Keepers

At C Law any person may establish an Inn, nor they are so numerous, that in establishing another it wd make a public nuisance of them. 3 Bac 178. 2. 1. Roll 84. 1 Roll 84. Cro J. 384. No Licence necessary by C Law.

And by assuming the character any person who did so, wd be liable for the duties, at C Law. 4 Bl 168. Cro Eliz 548. or 28. 2 Hale 174. 3 Bac 171.

A disorderly Inn may become a public nuisance and the keeper of it may be indicted for it.
4 Bl 168. 1. Hawkin 225. 4 Bl 168. Cro Ch 542.
Inns shd not be confounded with what in Eng are called Alehouses, wh are Licenced. In Eng. any person may set up an Inn. Not so in the U S. Tatle 45. Hilton Ag.

For disobedience to the Laws regulating Inns. the licence may be taken away or suspended a time in Court. Idem

Duties of Inn Keepers

These consist chiefly in the entertainment of Travellers as Guests, and the care and custody of their property or effects. 2. Co 87. 3 Bac 186. 1. 8 Co 32. It doth extend to the persons of Guests.

And if an Inn keeper refuses without sufficient cause to entertain a traveller upon tender of a reasonable sum, he is not only liable in an action on the case to the traveller but may also be indicted, for his Inn is a public nuisance. 1. Vaus. 225 1. Bl. 164.

The care and custody required of an Inn keeper doth extend to the person of his Guests, Bl. then

a traveller is beaten at an Inn, the keeper not
not liable. 8. Co 32.

But he is liable for his own misconduct as
well as that of his Servants. so if he gives travellers
unwholsome food. 3 Bac 182. Rolle 88.

Sickness in the family may excuse the Inn keeper
from taking the guest, but if he receives him into
the Inn, his absence, sickness or even Insanity wont
excuse him from his liability as Inn keeper.
Cro. 63. 522. 3 Bac 182.

An Infant in keeper not liable as an Inn keeper.
1 Rolle 2. 3 Bac 182. 1 R 4 & eq V 2 or 2

There is a 3d analogy between an Inn keeper and
a common Carrier. Dyer 158. 3 Bac 183.

If a host requires his guests to lock his apartment
and he refuses otherwise to be liable and the Guest
refuses or neglects to do so, and the Guest loses his
goods. It has been made a Question an the Inn keeper
wd be liable. I think not. Mo. 158. Dyer 200.
3 Bac 183.

It is settled however that merely delivering the key
to the Guest, will not excuse the Inn keeper for
the Loss of the goods, but he must actually ask
his Guest to lock his door. 8 Co 33. a. n. 2 Bac 183.
5 T R. 273.

It not necessary to subject him that the Inn keeper
shd know what the goods are. But he liable for
those duties only to travellers or those persons who
board at his house, and whom he charges as he

as he does Travellers. 12. the same price.
Nor does it extend to those persons who board at his house. in General as boarders. 8 Co 32 b. 1 Rolle 3. 3 Bac 183. Sir W 276.

An Inn Keeper ant liable as Inn keeper for the loss of goods. in the absence of the owner, in he receives a price for keeping. He is liable in such case only as Depositary. Cro J. 188. 5 T R 273. Noy 126. Cro J. 179.

But for property for the keeping of wh he has no receives a price, in the owners absence he is liable. 1 Rolle 3. Cro J. 188. Salk 388. Noy 126. Popk. 179.

There is some nicety in ascertaining what time will take the character of Guest from a Traveller. Now it ant necessary that he shd be in the Inn every moment. 3 T R. 273. Cro J. 188. 1. Rolle 3. 338.

If a Servant is robbed of his Masters goods at an Inn. the Innkeeper is liable over to the Master. 5 T R. 273. Cro J. 224. Yelv 162.

Tho an Innkeeper may detain the person of his Guest till the whole bill is paid, still he can only detain the horse for his keeping - not for the rest of the Bill. Salk 388. Carth 137. 3 Bac 188 2 Rolle. 85.

If a Guest leave the Inn without paying and without permission to leave y Innkeeper may pursue and take him on what is called Fresh Suit. 2 Rolle. R 138. 3 Bac 186.

If an Inn keeper detains a horse or any animal he has no right to use him, but he may add the price of his keeping, during the Detainer to the original Bill. (Moor 877. Str 556. 3 Bac 185.
He detains by licence of Law. and cannot use it.

A promise by a Stranger to pay the Bill, if the Inn keeper will discharge the person of his Guest or his horse, is binding. and not within the St of Frauds. as some have supposed
3 Burr 1888. 1 Wils 305. 7 Cutt 101. 3 Bac 185.

Note. an agreement to carry goods Gratis, while it remains entirely Executory, is not binding.
Ld Ray. 909. 10. 19. 20.

Finis of this Title

Sheriff and Gaoler.

Nature of office, manner of appointment &c. Nature of office.

The word "Sheriff" is derived from Sax. words, Shire & reeve: 1. Governor or keeper of the Shire or County. 4. Bac. 430. 1 Bl. 339. 343.

They are appointed in different modes in different States. — by the Electors or Voters of the County in some — by the Executive and Senate in others. In Court by the Legislature for 3. years. Int. St. 388.

They are appointed in Eng. by the King out of a Nomination of 3. made by the 12. Judges. formerly by the inhabitants of the County. 1 Bl. 340. 1.

Edw. the 4. Cap. 3. and 23. Hen. 6. a Sheriff can hold his Office one year. but it is said, he may be appointed "durante bene placito"

He must reside in the County for wh. he is appointed, for a Sheriff regularly has no official function out of his County. But if it is necessary for completing an official act, begun in his own Bailiwick to go out of the County: he may for the time, under authority out of his own County: as if he is commanded by Habeas Corpus to carry a prisoner [illegible] coming in another County, in maintenance of the Peace, Title he delivers him into the in the County. Bac. Sh. F.

So if a Prisoner escape into another County, the Sheriff may on fresh suit, pursue and retake him: for the act of taking is only for home use and ordinance of his local authority. Plow 37. Bac. Sh. F.

If the Sheriff having begun execution of Process, w. be during goods, is removed before execution is complete, he must Salk 323. proceed to complete it, execution of Process being an entire thing: and the ultimate consumating act having reference to the Writ. Bac. Sh. F. 1 Rolle 93. 4

to its incepction. This rule was violated in N. Y. some 20 yrs ago, at an election for Governor, when Jay and Clinton were Candidates. Jay received y greatest number of votes, but y office of Sheriff expiring in some Counties just before y election, y votes from these counties were rejected as Informal, thereby giving Clinton y Majority.—

Same rule holds as to Constables.

Hob. 13. Bac. Sh. h. 1. h. 1. At C Law. y Sheriff may appoint Deputies, or under Sheriffs, who as his representatives or Substitute, may execute all y ordinary ministerial duties of his office. His Judicial Duty cannot — nor all his Executive.

+ Bac. h. 1. 3. Salk. 95. 4 Co. 13.

The deputy is removable by y Sheriff at pleasure, he being only a substitute or Servant. This y Sheriff may do, without impeachment and without assigning any reason: but while y deputy is allowed to remain in office, his General powers cannot be abridged by y Sheriff.

Bac. p. 55 Bac Sh H. 1

In Eng. y deputy acts officially only in y name of y Sheriff, not as a known public officer, but merely as a Servant. Writs are directed not to him, but to y Sheriff, &c. and are returned by y Sheriff ※ the meaning of y rule is, yt an under Sheriff cannot return a Writ, yt he can't endorse it in his own name. it must be done in y name of y Sheriff.

In Conn a deputy acts in his own name and is treated as a Public officer. and writs may and usually are directed to him. & a writ executed to y Sheriff only may be executed by his General or Special deputy. & in y latter's name. Hob. 25.

A Covenant of a deputy not to execute Process of a certain description is void, as being by Law, for it's his duty to execute all legal Process delivered him to be executed. Bac. Sh. H. 2.

Hob. 4. "Contracts 35"

A deputy cannot delegate his authority by y appointment of a sub deputy, he himself being but a Servant or Representative & to a principle of Law, yt a representative can act only in his own person and never by Proxy. B.C. — upon y principle a peer may vote by Proxy, he acts for no one. but a representative in y house of Commons must vote in his own Person. Tho' any one may legally assist him, & he may empower another as an assistant to do a particular act for him, yt not being an appointment of his Power. But an arrest by his assistant is not good 1E. where y deputy ant in Company. Salk 96. Sh. H.4.

* This is a General principle of political as well as municipal Law.

If a Sheriff directs a Warrant to 2. persons, either of them alone may make y arrest. y authority being of a public nature, wh when confered on two or more individuals, is generally Joyntly & Several. Secus when y authority is of a Private nature. — tis then Joint, ni there is an express provision, yt either may act alone.

Bac Resp. 18.1.2. Fungi 17. Bac Ab. H 4. Co Litt 181

If a deputy is guilty of any neglect of duty, (as in y case of an escape) y Sheriff may have Case vs him, for y sheriff is liable over, to y party injured for y acts of his deputy and he may an action vs y Deputy immediately, even before a recovery vs himself by y injured party. for if he was obliged to wait till then, he might incur y possibility of losing it. as y Deputy might become a Bankrupt. &c. Yelv 93. Bac Ab. "Evi" 114.

In such case y deputy has violated y Implied contract "to discharge his duty faithfully."

It must be very rare, yt y Sheriff brings an action on an Implied contract, for there is usually a bond or Covenant with Security. The usual remedy at y s day, is an action on y bond or Covenant.

A Goaler, (or a Common Gaol) is y Servant of y Sheriff, appointed and removable by him, y latter being ex officio Keeper of y Gaol in his county — not so y Gaoler of which y Sheriff aint Keeper.

A Sheriff has no right (regularly speaking) to confine his prisoners in any other place, on y Common Gaol, ye being y place appointed by Law. Hob. 202. Lach 16.
1 Salk 328
3 Bac 171.
If he does, tis a False Imprisonmt. 1 Selw 318.
"False Imprisonmt ?"
If therefore a Sheriff shd confine a person in a Private house, or any other place yn a common Gaol, he wd be liable in an action of False Imprisonmt, in where he was obliged to do it, as where y Gaol was broken open. Burn down — Burnt. &c.

Kirby 48.
The Sheriff being "ex officio Keeper of y Common Gaol and as there is in" County, no Common Gaol, of wch he is not Keeper, he cant there be imprisoned, nor of course arrested in his own County, for as he is y Governor or Keeper of it, he can set himself at Liberty. If a deputy sha arrest him he cd instantly discontinue his authority, by removing him from office, or if a Constable sha arrest him, he cant commit him to Prison, but y Goaler must do it, and he is a mere Servant of y Sheriff. and removable at any moment, y Sheriff's place, a do it. (he cant be confined in any Gaol, out of his county, in a Civil case. that wd be unlawful.)
3 Lev 399
Lach 10.
1 Mod 158.

Pure what is to be done in Criminal Cs? Is bub-lic justice to be defeated, because he is Keeper of y Common Gaol, in his own County? P.G. hain't found any thing very definite on yo subject.) he may however be committed to another Prison. as to a different County, P.G. thinks "from y necessity of y Case"

In 5. Robinson 22. tis held yt a Sheriff arrested on a Ca Sa by a Coroner, must be imprisoned in y Coroners, house. This seems to P.G. not Law. ni it may be said, yt in a new case y Ct may make a new rule to suit y Exigency of y Case.

The Sheriff for want of a Gaol may make his own house one, for he has authority to a Goal, but no other officer. P.G. thinks has. On Mesne Process in in y Eng. practice, he may, it seems, be arrested, for if not liable to Imprisonment, he may be discharged on Common Bail, wh holds him to Trial. (5 Robin 24) In comm practice, Common bail being unknown, he ant liable (P.G thinks) to be arrested on Mesne Process. for as they have no fractions. 12. Common Bail, a person not liable to imprisonment on Mesne Process, is of course, he thinks, not liable to arrest. If he is so arrested, y suit abates?*

*Query why abate? In Eng, he may be committed to a different prison.

Sheriffs Liability for y acts or defaults of his Deputies or Under Sheriffs.

The deputy being y Servant of y Sheriff, y latter is in many cases liable for y acts & y defaults of y former. for they are in legal Judgment, y acts and defaults of y Sheriff. "Qui Facit per alium, facit per se" = Mod 119" = Mod 119.

Co 18. 2 Zer 158. 1 Saunders 84. 5 Co 80.

Whenever y act or default of y Deputy is considered as y act &c. of y Sheriff, y latter is liable.
Hence he is allowed to take security of y deputies, for y faithful discharge of their duty. — were he not liable for them, he would not be allowed to take Security.
4 Bac 441.

305

The general Rule is, yt y official acts of y Deputy are as to all civil Purposes, y acts of y Sheriff, & he is civilly liable for ym, but not liable Criminaliter. He is liable for omissions as well as acts. There is no such thing, as a legal imputation of Crimes from one to another. To subject him criminaliter, he must have been guilty of an offence personally. 2 La Raymo. 1574. Doug. 42. 2. K Bl. 154. Sach. 18. 1 Vent 235. Cro J. 330. 4. Bac. 442. 2 T R 154.

Dept.

For y private Acts of y Dep. y Sheriff ant liable, for these ant official. he acts not as Deputy. 4 Bac 442. 1. Rolle 94. 1 Leon 145. Cro Eliz 175. Hence if y Deputy levies an Execution, as A. on y goods of B, it has been doubted, whether y Sheriff not being privy to y act is liable. as y Deputy says Bacon doth act in pursuance of y Sheriffs authority. 4 Bac 442.

That y Sheriff is liable for y Deputy's acts officially, tho' tortiously, see Masters and Servt 412. and in y case y Sheriff is liable in Trespass. for y Dep. and all his substitutes are considered but one officer. 2 Bl R 832

4 Bac 412. 3 Mod 309

2 Bl R 832. Doug 42. 2 K B 352. Noy 27.

Q. Thinks, he ought to be liable in Trespass, on y case, as Masters generally are for y Torts of their Servants. For y deputies neglect of duty, y Sheriff only is liable to y Injured party at C Law. — y Dep. not.

Cro Dig 603. 1 Rolle 94 94

As. For negligent wrong — omission to execute a process, for y deputy ant a known public officer, acting in his own right, or on his own account, nor is y process directed to him. Cow 403-6. Salk 18. 5 Co 82.

But for a positive Tort or Misfeasance committed by y Deputy in his office, both are liable. The Sheriff is liable because y wrong is committed by his Servant. The deputy is liable, because y party injured may consider him as a mere Tort Feasor

and ant bound to enquire under what supposed authority, he acts, &c. for a voluntary Escape. Embezzling a writ of Ex^n, breaking outer doors in civil cases.

An officer when sued for a positive Tort, is not sued in his official character, . Secus when sued for neglect of duty &c. Salk 18. Ex D. 603. Cro Car 153, 03. Cro J. 331.
For y defaults of a Special deputy appointed at y request of y Pltff. or y proceeds and upon his nomination y Sheff ant liable to y Pltff.. The appointmt so far as respects his rights, is at his risk.
4 T.R. 28. Cro Dc 90.
In Comnt y Deputy is liable for neglect of duty, as for positive Torts. for he is a known public officer proceds is directed to him and he makes returns. in his own name. Hence he may sue and be sued as Deputy. The Shff is liable also. in both cases.

The foregoing rules respecting y Shfs liability for y acts and defaults of his Deputy, extend to y acts and defaults of Gealers, for these are a Species of Deputies.

If after y death of a Sheriff, and before a successor is appointed, y prisoners escape, no one is liable, for y Sheff being dead, y Gealers authority ceases.

In y s case there is no remedy but detaining on y appointmt of a Successor. 3 Co 72. Cro Eliz 303. 1 Mod 14.
+ Bacon 445.
Suppose y Gealer in y last case detains y m. in y Interval, is he omits to enlarge ym. is he guilty of False imprisonmt. P. (P G) presume not. he has no authority to discharge ym, he only keeps y key and they remain in "Statu Quo"
— — — op 81. — S

Authority and Duty of a Sheriff. & his Representative

In Eng. y Sheriff is a financial officer, as well as an Executive & Ministerial officer. 1 Bl 343. 4 Bac 448 S.

In Connt an executive and ministerial officer only. Goulaw. treats y min a a ministerial officer only, and as Conservator of y Peace, in wh latter character, he is strictly an Executive officer.

Note. A ministerial officer is one who executes y Law, in obedience to y command of some superior officer: as a Sheriff in executing a Precept.

An executive officer is one who executes y Law, without such command, as a Governor or Secty of State, in performing a duty prescribed by Law, without y command of a superior. IE. y command of y Law itself. Heads of Departmt are Executive and Ministerial.

First

1. As Keeper or Conservator of y peace, y Sheriff is y first Executive officer in y County, or rather of y County. IE. y first Executive County officer. 1 Reb 23 S. 1 Bl 343.

At Law, y Sheriff may apprehend and commit to Prison without Warrant, all who break y peace, &c is found "Ex officio" to take Murderers, Traitors, Felons and other offenders, and to commit them to safe Keeping, and to defend y County vs Public Enemies. And for these purposes he may command y Power of y County, to assist - 12. all Thalls. & Free & ni Pers." 1 Bl 343. 1 Bac 430. S. Co Lit 168

In Connt. he cant break y peace, for yd is a Judicial act. - he may arrest and commit.

In Connt. he is empowered by St, to suppress Riots, Rants

and all unlawful assemblies, and tumults. to apprehend without Warrant all disturbers of y peace. & to bring them before y Magistrate and to command assistance of all suitable persons. 12. all persons of age and ability in y County.

The same powers are given to Constables in their respective towns.

Second as a ministerial officer. he is bound to execute all legal process, regularly directed to him. and on refusal is subject at C Law to Fine and Imprisonment & to a civil action. (Case by y Party aggrieved.

Now 74. 1. Sl 344. 4 Bac 44.

He is liable in Case in Comnt for not returning a Writ. 1 Sa 206 In. Eng.* he is ruled to return it. & on neglect. is proceeded vs by attachment as for Contempt. Doug 446 2 H Bl 233. 1 Bo Com 24. Dg thinks y proceeding might be y same here. In Comnt by St he must give a receipt. The Sheriff or his Deputy may command y "Posse Comitatus" at C Law. when resisted in y Execution of Lawful Process. 4 Bac 453. 5 B. & Ald. 616.

St gives him similar powers, & additional, for he may command y Militia of his County, as an Organized Body.

A Sheriff or other officer may not break y outer door or Window of a house, to arrest y owner. In a Civil case or take his goods for it in his castle. and so yt y family may not be exposed to Thieves and Robbers.

5 Co R. Cowp. 1. 3 Co Ins Sl. Cro. 62. Co. Dig 654

* This originated in y Feudal ages. y reason is petitions of Error in Comnt decided yt a may.
Tis said however in y old books, yt y Ex. of Process by breaking y door is good. tho' y officer is a Trespasser.
5 Co 92. R. & 5 Mod. R. 155.

Dg. thinks yo ant Law

* But y modern practice is to discharge y Person arrested. This is however, in some measure, discretionary with y Court. Cowp. 1. 3 Bl R 23.

* This is done in motion 4 Bac 454.

Breaking Doors

What is necessary to a Breaking? Does lifting a latch or raising a window necessary to it in Law, say? Must it not be a removal of some Fastening calculated as a protection to Chests and Doors. an act of violence.

It may compulsorily raise a Latch. 1 G. Hendre.

10. But so privilege is confined strictly. It extends to no other but the outer doors or Windows. If then the officer can enter peaceably. (I.E. without breaking) at either of these, he may, break any Inner door. Chest or Trunk. but there must be a demand and refusal.

Cro Eliz 667. Hobart 82. 236. Cumb. 77. 337. Cro Jac. 604. 5. Cro Car 7.

The privilege of outer doors and windows extends only to the protection of person. family and goods. of the owner. or person dwelling in it. 5 Co 93. B. Curtain 185.

4 Bac 455.

If then A is in the house of B., the officer after request made. for A. refusal, may break the outer doors and windows to execute Civil Process on him.
So if A's goods are after requesting a delivery & a refusal.
There as to the propriety of the privilege in any case. Is it not a reproach to the Law. thus to defeat private Justice? Law?
In the case of a Criminal Process. the privilege not allowed. The officer may break outer doors. &c. if necessary. but he ought first to make known his business and demand admittance. 5 Co 91. 4. Bac 454.
So he may on Process to compel one, to find sureties for the peace or good behaviour, it being of a Criminal nature.
12. Co 131. 4 Bac 454.
So he may on Process of forcible entry, and Detainer. it being of a Criminal nature. 4 Bac 455.

So where one having committed a Felony is pursued with or without a Warrant. by an officer or Private Person.

Except if suspected may and no process — no Warrant 4 Bac 455.
in ye case ye arrest is justified or not by ye event. 2 Hawk. 139.
If he is convicted, ye arrest is justified, Secus not. He is
guilty of False Imprisonmt. So to prevent an affray or prevent
a breach of ye Peace. So if those who made an affray
are immediately pursued by an officer. Wht warrant 5
4 Bac 456. 1 Rost 66.

So on a Writ of Habere facias possessionem to a Civil
Process. ye officer may break ye Outer door. &c. if entrance
is denied him. for ye very object of ye Writ. ye command
contained in it. is to give peaceable & exclusive possession
to ye Pltff & there is no other way of Executing it.
4 Co 91. B. 4. Bac 455.

This privilege extends only to ye Mansion house strictly.

So on a Civil Process. ye Shff may break open ye door.
of a barn. not adjoining ye house. for ye privilege is
strictly construed.

So G.P. possessed of a store detached from ye Mansion 1 Ves 638.
house. Secus possibly if ye owner lodge in it. 1 Selw. 186.
Stores have often been broken open in Cmnt on C. Law
principle.

If ye Shffs Bailif having entered a house
carefully. is locked in. ye Shff may break in to release
him. Cro. J. 555. Palm. 52. 4 Bac 456.

The Def committed a wrong. and ye Shff. having entered
for ye purpose, may not take him in ye goods.

So if a person being arrested, escapes into his house, as in
all cases of Escape. for a right to ye Custody of ye person,
has attached in ye officer. Palm ~~456~~. 54. 4 Bac 456.

But if a person illegally arrested by ye breaking of an Outer
door. is charged while in Custody with a mother Process,
In another suit and by an other officer. ye last arrest is
good if there is no collusion between ye parties. and ye

officer in y two cases. 2 Bl Re. 823. Cowp R. 605.

By Stat 29. Ch 2d. No civil process may be served on Sunday (12 during y season of daylight on yt day. Com. R. 541. – if so, y service is void & y officer guilty of false imprisonment –
1 Salk 78. 4 Bac 456. 2. Com R 541.

2 Ed Ray 1628 Focus where a prisoner escapes, in yt case, he may be retaken on y Sabbath, for is merely y means of continuing y officer's custody. 5 Mod 95. 253. 5 vR 25. Salk 626
And is in y nature of fresh persuit. The Sheriff y same right to retake him as to keep him in custody, or to resist his attempt to escape on yt day, day.

In case of illegal arrest on Sunday, y Ct will discharge y prisoner on motion. If no Ct is sitting, his specific remedy is by Writ of "Habeas Corpus"
4 Bac 456. 5 Mod 95 – 6. Mo 95.

Escapes

An escape is an unlawful evasion of legal restraint, or custody. 2. Bac. 233 Escape. The terms in law signify illegality.
When therefore a person being under lawful arrest, & restrained of his liberty, either privately or voluntarily, evades such restraint, or is suffered to go at Large, before he is delivered by due course of Law, he is said to escape.
Hill
The party escaping is deemed guilty of a wrong, when Criminal of a Criminal wrong. & in both cases, is responsible in one. Civiliter, in y other Criminaliter –

Tis essential to an Escape, yt there be a previous legal arrest. for y evasion of an illegal arrest, is in Law no Escape. 4th D. 63. J. Cowp 65
Where y arrest is illegal, there can be no Escape.

The doctrine of ~~arrests~~ Escapes necessarily involves yt of ~~Escapes~~ arrests.

Arrests &c.

First y arrest must be made in pursuance of lawful authority.— Secus tis void. This yt authority may sometimes exist without Writ or Warrant. This is in Criminal and not in Civil cases. 4 Bac 450—

As to Arrest without Warrant. see Tidd "Imprisonment"

13. Where y arrest is made by virtue of a Writ or Warrant, Bac. a Escape. y Gen. & Law Rule is, yt if y Ct from whose authority it issues, has Jurisdiction of y subject matter & if y Process itself is regular, y arrest is lawful— & suffering y person so yt arrested to go at large, is an Escape, even tho' y Process is erroneous. Esp D 333. Cl. 559. 2 Ind 384. 5. Co 141. 3.

Where y arrest is on Mesne Process however, y Defd going at large is no Escape. if he appears in Ct on y appearance day, & bates in bail above as required by y rules of Practice. 3 BL. 290.

Talk 273. 10 Eliz 148. Cam 148.

Or in Court. if he is forthcoming during y life of

This rule supposes y mode of making y Arrest to have been regular, as without y unlawful breaking of doors &c, for however complete y ~~authority~~ may be, an abuse of it may render y arrest unlawful.

By y subject matter is meant, y cause of action or offence.

Secus if y Ct has no jurisdiction of y subject matter in such case, y process and arrest are void. and of course, there can be no Escape.

This Rule is universal.

But still in Court, y officer ain't liable to y person arrested, ni y defect of Jurisdiction appears on y face of y process—

In certain cases, also, tho' y Ct has complete Jurisdiction y process may be void, as being irregular. As a writ returnable to any other yn y first term, to wh it can by Law be made returnable. In such cases y arrest is void. & there can be no escape. — Here there is no Writ in Law. 18. no Lawful Writ.

Bk 373. Bro Ciz Cath 4th 48.

In Connt Mesne process don't usually issue from y Ct applied to for relief, tho it sometimes does: The general rule therefore don't sufficiently broad. to reach all arrests. made under Mesne Process. in practice. tho it extends to all cases in wh y process is issued by y Ct to wh it is returnable.

But as to cases of Mesne Process, where y writ don't issued by y Ct. to wh it is returnable: y rule in Connt must be yr: If y process is regularly issued by competent authority and returnable to a Ct, having jurisdiction of y subject matter. an arrest under it is lawful. (if y mode of arrest is proper): of course suffering y prisoner to go at large, may be an Escape. Ac. If not surrendered. before return of Execution.

Because if issued without competent authority (as by a private person) or returnable to a Ct having no Jurisdiction (Ret Cus) to action for 100 £ before a single Magistrate.

Irregularity renders Process void in Connt and England.

Second Point

There must be an arrest actually made or there can be no Escape.

At C Law an officer having made an arrest on Penal Process. don't delegate it a stranger a right to hold y Prisoner in his own absence. It is in Law. an Escape, and y Stranger if he detain y party. is guilty of False Imprisonment. as he has no authority to detain 1. B. et P. 24. yr rule is probably founded on y Reason, with wh y law respects and guards y rights of Personal Liberty.

Bare words will not make an arrest, there must be an actual touching of y Body, or (what is tantamount) a power of immediate possession of y person and submission to it. Ed D. 604 Cro E. 596. Bull N P. 62.
An officer merely says "I arrest ye" & y person runs from him, here is no arrest, and of course no Escape.

15. Seem if y party had submitted, tho' y officer didn't lay hands upon him.

If one is arrested at y suit of A, and while in custody, on a writ in B's favour, vs him, is delivered to y officer. y Deft is in contemplation of Law, "ipso facto" in Custody, on y second Writ, & of course if suffered to go at large y officer is guilty of an Escape in both Cases
2 Bac 236. 5 Co 89. Salk 275.
Query, In Cases where writ goes as well as y property, as y Person? For y Pltff may elect to ~~buy~~ take y former. tho' if he don't direct property to be taken and none is taken, yet would be an Escape (Here) I conclude in both Cases. At C Law it don't.

Third. The arrest must be lawful, or generally speaking there can be no Escape. Cowp. 64. Bac Escape a. 2. Ed D. 604.
An
An arrest must be made by authority of y officer, Cowp 64 to whom y Writ or Warrant is directed i.e. he must make y arrest in Person, or must be in Company of y officer or follower actualing making it, but y arrest may be by y hand of y Follower. But y officer need not be actually present, or in sight — tis sufficient if he is near and in pursuit of y same object. Cowp 65. 6. Mod. 211. Bac Escape. Ed D. 604.
As process by Shff. vs S.P. y Shff knocks at one door and y officer at another, and y person goes out at officers door. An arrest on Sunday, in Civil

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Cases being said. (Cante 12) y officer is ant chargeable
Cro D. 614. with an Escape. if he let y prisoner arrested on y to day
Cro B. go at Large. Bac Escape a. 2. 1 Mod 95. Salk p. 8

So if Arrest is made by mainprize, breaking an outer door. or window of Def' house. there can be no Escape.

The Sheriff is guilty of False imprisonment and y sooner he ~~arrests~~ releases him. y better.
On ye point, perhaps. there may be some doubt, as y claim of y party to be discharged, on motion. is not Strictly Juris:" still as y arrest is a Trespass in y Sheriff, he cannot be bound it wd seem, to continue it. ante 9.

If y officer having an opportunity to arrest a Def, refuses to take him, and y latter eventually evades y Arrest, y officer is liable in case, for neglect of duty. But there is no Escape. 2. Mod 23. 4. Bac Ab Esc. a. 2.
2d Ray 331. 1. Mod 251. 55.

w. 9. — p. 10 — 20 — w

An officer exercising a General authority (as Sheriff General Deputy or Constable) ant bound to show his Writ or Warrant to y Def before he makes an Arrest or seizes goods, tho y latter demand it. J. Co. 4* 52. Bac Sh. m. 1.
But upon y arrest he is bound to make known y contents of y Writ. Cro D. 604. Cro B. 485. 8. Mc 87.

But a Special Deputy or Bailiff, must if required show his Warrant, before he makes y arrest, Seem Def may resist him, for he ant a known officer. and hant no General authority — y Def ant bound to submit without Evi of his authority. But he ant bound first to show his Warrant, wn it is demanded.

Bac. Sh. m. 1. J. Co. 69.

Escapes are of 2. kinds 1. voluntary 2 Negligent.
A voluntary Escape is one wh takes place with y consent of y Goal keeper, or other officer having custody of

3 Bl 415. 3 Co 52.

y Prisoner.

Negligent are such as happen without his consent. 3 Bl 415.
Every person committed to prison is to be kept in safe and close custody.* If then y Shff suffers him to leave y limits of y Prison, for a moment, he is guilty of an Escape. * 1E. till delivered by due course of Law.

Infra.

1. Voluntary If a Shff or Goaler admit to Bail a prisoner, not bailable, he is guilty of a voluntary Escape. So if he consent to y prisoner's going at Large. from prison a moment and even with a keeper. 3 Co 44. Bac Ab. B1 (Bac Ab Ce. B. 1. 1 Rolle 806. 1 Rolle 806. 3 Co 44. Infra

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17. So of a person arrested on Execution & not committed. The reason of ye sinctness will appear Post.

2. TR 176. 1. B. & P. 26.

Prisoners committed on Criminal Process, are confined within y walls, Those on Civil Process, may by procuring security - to save y Shff. harmless, be admitted at his discretion to y liberties of y prison.

2. TR 126. 131.

It has been decided in Eng. y^t if a prisoner committed on Ex^t is brot by "habeas Corpus ad testificandum" tis a Voluntary Escape. But y^s can't be Law. - it is not where his testimony is required. 1 Rolle 72.

Bac Ab. B. 2. 3. 1 Sels 72. Bull. N.P. 72.

But if y officer who bring's out y prisoner on "Habeas Corpus" grant him an unnecessary or unwarrantable liberty - tis a voluntary Escape. As taking him 20 miles out of y direct road. He must bring him to Ct in convenient time and y most convenient way. 1E reasonable

3 Keb 305. Ld Ray 31. Bac Ab. Ce. B. 2
Ld Ray. 788. 6 Mod 78. Cro Ch. 14.

So an officer having made an Arrest on Final process, must commit in convenient time, or he is guilty of a Voluntary Escape. 1. B. & P 24 25 C 170.

The reason is, yt it is meant as Corporal means of obtaining satisfaction and therefore must not be relaxed by y Shff for y object might be defeated. So if he permit a prisoner to go at large, with his (y officer) servant &c he is guilty of a Voluntary Escape.

The Shff has no right to discharge a prisoner committed on Ca. upon payment to himself of y contents of y Execution. and if he does, is guilty of a Voluntary Escape. The reason is, he ant Agent be for y Pltff.
Cro Ele 404. 1. Mod. 4.94. 8 Ds 225. 366. Bac Abr Ee n.

And if on Ca. vs y body, the Shff having arrested, y Deputy discharge him on receiving y debt, and is sued for y Escape, before y money is paid over to y Pltff he is liable. 14. East 468. Ld Ray 333. 12 Mod 21.
For he ant Pltffs Atty and hath any right to receive y money. But if y money by y Creditor, before an action brot vs y Shff, is a Waiver. I conceive of y Shff's
18. claim. Here no Ca. Sa. in yo State, (Comit) ergo y Co Law. rule don't obtain here.

If Shff marry a woman committed on Ca., he is guilty of a voluntary Escape, for a man can't be Gaoler to his wife. Plow. 17. Bac Abr. Ee. B.3.

If a Shff upbound and in his Sureties, can Rep. he is guilty of a voluntary Escape, as by yt act he renounces the authority of y Sureties. Ewd & Ods. & G. Hinke him Guilty yet particular sureties. Hardres. 311. Cro J. 608.

If a prisoner having y liberties of y Gaol granted, gives a disposition to escape, by transgressing y bounds, tis y Gaoler's duty on notice of yt fact, to recommit him to y Mates. Secus, if a resurgent Escape is Voluntary.
But if he escapes, before showing such a disposition
2 Ld 131.

or before his known to y Gaoler, y Escape is negligent.
Root 166. 12 H 8.
If he leaves y limits on Sunday, y Shff may commit him.
The Shff. ant bound to grant y limits of y Jailyard, in any case, even upon bond of Indemnity. Its matter of Indulgence and discretion with him. But he may lawfully do it. and y bond of course is legal. (Ex Comt Ct he is bound to do) and he may & recommit to y Walls at pleasure. 2. T R. 131. In Comt. as he is bound to grant y liberties, F. g. Minks, there must be cause for committing.
In Comt. y County Cts in y respective counties, have authority to order into close imprisonment, all persons committed on Execution. for debt, damages, fine or Costs, Except where y Execution is issued by y Supreme Ct. and in such case y Sup. Ct has y same power. (ant ys St now repealed?) since y arbitrary and unconstitutional interposition of y Legislature. in y case of Fowler. vs Freshin. 1819.

The Shff is bound to obey, or is liable as for Voluntary Escape. In y same manner as if he had permitted a voluntary Escape. — his refusal to obey — is deemed a Voluntary Escape. But ys authority of y C. Cts extends not to Cs. in wh y Judgmt on wh y Prisoner is committed, dont exceed 1. Dole. For y mode of proceeding, see new St 36.

Second Negligent Escapes are such as happen without officers consent.
Thus if y Prisoner arrested evades his restraint by fleeing from y officer, or by using violence, y escape is wrongly negligent. So if committed Escape by breaking Prison or in any other way, to wh y keeper is not consenting, as by Rescue.
3 Bl 416. Cro J. 419. Tchorp. 139.
In an action for an escape, as y officer, his Indorsement of

of "Non inventus" is satisfied, y writ was delivered to him.

Difference between Escapes on Mesne & Final Process.

If a person arrested on Final process, tho' not committed, is allowed to go at large for a moment, y officer is liable for an Escape. 2 TR 172. Cro J. 605. 3 Bl 415.
"Title Execution. I"

So his enlarged on security given, yt he shall again be surrendered into Custody, and y security is illegal and void. it being given to affect False Imprisonmt. Contra 2. Root 133. Sed Quere.

Reason. as it operates as a Penal or Coercive means to get satisfaction of y Judgmt But at C Law. a person arrested on Mesne Process. but not committed, may be permitted to go at large without subjecting y officer, if he is forthcoming at y return of y writ. In Comm during y life of y Execution yt may be obtained vs him. Kirby 239. 382. 434.

2 TR 172.
2 Bl R 1049
3 Bl C 415
Sty 37
Salk 408.
2 Wils 235.

Reason. if he is forthcoming to respond y judgmt, y wrongness of y Arrest is answered. Whereas an Arrest on Final process is y coercive means of obtaining paymt.

If not thus forthcoming, y Officer is liable in case for y escape. The escape in yo case is negligent.

2. Wils 294. Cro J. 609. Cro Car 623. 52. 863. Bac. Ce D.

But if a person arrested on Mesne Process, is committed y gaoler permitting him to go at large for a moment, subjects him for an Escape. For upon commitment, every prisoner, is to be kept "Salva et arcta custodia"
Salk 271.

By Com Law. y time of obtaining is past on commitment, relaxed by St.

2 Wils 294.
1. Roll 807
Cro J. 610.

No [illegible] of Plffs recovering a Judgment vs. y Prisoner, amt
a Nonsuit of y right of action vs. y Shff, for tis a Double
Tort, or wh. he as well as y Shff is liable. 2. Mills 204.)
or (if y Escape was voluntary) vs. y Jailer.

By y St. = Ent, a person committed on Mesne Process,
may be enlarged by y Shff. upon a Bailbond.

By St. 23. Geo. 6th a person committed on Mesne Process,
may enlarged by Shff on Bailbond.

If one arrested on Mesne Process, escapes, y Plff's action
vs. y Shff is by action on y Case. 2. Bac. 245.
The damages are Presumptive & y action can't be supported,
ni. y Plff prove a legal claim vs. y person escaping.
2. Lev. 85. 3 TR 40. 41. 2 Str 873. 2 Mich 295. 2. TR 129. 4 DD 611
Cro D. 609. Esp. R. 109. Hoxi Ca. 65.
But y prisoner's acknowledgmt of y debt is good Evi.

That Plff can't recover more yn his original demand,
see Evi 23. 1 John. 215.

For an Escape on Final Process, y Plff may have Case
or vs. y St Westm. 2. 3 1. Ruch. 2d Debt vs. y Sheriff. Cro D. 203.
Str. 153. 2. H Bl 110. 113 2. TR 129. 132.

These Sts extend as well to Escapes, before commitment,
as afterwards. In y former it. case, y Jury may give
what damages they think proper, for y Shff's misconduct,
for y s action aint really for y loss of y original action.
Ibid. Cro D. 609.

Hence y party escaping is a Competent witness. vs. y
Shff. for he is not discharged by a recovery of damages
vs. y latter. See Evi.

If special damages only are given, y Pltff may still recover his debt vs y original debtor. 2 TR 129. 2 Wils 282.

B N B 69. 611.

Suppose full damages are given, ant y Rule y same. Semble it is. 5 TR. 40. 41. Pea R. 124. Evi To 172.
3 Esp R. 208. 2. TR. 129.

B. J. thinks y original debtor liable whatever y Jury give. But if y Pltff bring debt vs y Shff, y Jury must give y whole sum. for wh y original debts was charged in Execution. — 1S. original debts and Legal Costs. hence # If such a recovery is a bar to y Pltffs claim. vs y original debtor. (Quere with the satisfaction)? y debt itself being considered as transferred to y Shff. (2. TR 126. 132. 2 BR 1147. Supra)

Esp D. 609.

Comyn To. seems require yt in case of a voluntary Escape from prison. whether on Mesne or Final Process. & whatever y form of y action may be, y Pltff shall recover of y Keeper. & suppose y whole original debt or damages. Comyn St 222. New Ed 366. This is peculiar to yo State probably.

This St then, if yo be y true construction, gives y same rule of damages in all cases. of voluntary Escape from Prison. as obtains in Eng. only in y action of debt for an Escape on Final Process.

If one arrested on Mesne Process. but not committed, is rescued. y officer is Excused, secus if arrested on Final Process. for he ought to have satis force, y power of y County. He is supposed in y latter case. to have time to raise y "Posse Comitatus" Why any more on Final on Mesne Process. & cannot tell. Said yt he has time to raise y Posse Comitatus" Why? But after a Def arrested on Mesne Process, is committed, Rescue is no excuse. for y Shff. rescue made by public Enemies. Rescue. by Robbers or Traitors

Cro J. 419. 3. Bl 416. Cro Eliz 873. Esp D. 610. "Title Trespass" on the Case 10. 11

in such case is no Excuse. No power greater yn Public Enemy's is presumed greater yn his.

1. Co 84. Str 482. 1. Roll 808. Cro. J. 610.

The same rule wch last obtains where one is arrested on Final Proces., wn not committed & yt original Pltff may maintain an action vs y Rescuer. an y Arrest was on Mesne or Final Process. Cro J. 480. 6. Hob. 180.

Cro Ch. 109. Hatton 98.

In these cases (where y Shff is liable) y Pltff may sue either y Shiff or y Rescuer: but by suing y Rescuer, he waives his remedy (it seems) vs y Shff — -or

6 Mod 211. Hatton 98. Cro Ch. 7. 109.

Cro J 657. 59. 610.

Yet it is said, yt he may have Trespass or Case vs y Rescuer. Hob. 180. Cro J. 486. 4 Bac 399.

Where ant Case y only proper remedy? P.G. can't see why he has a right to Trespass. for y damages are only consequential? —

In an action vs y Rescuers. y Jury may give either 22.
y whole or part of Pltfs original demand. If part only. y Pltff may still proceed as y Original Debtor.

6 Mod 211. Cro J. 657. 59. Cro J. 610. Bulle N.P. 69.

Quere. may he not proceed vs y Debtor; tho' y Jury shd give y whole debt vs y Rescuers in damages.

In an action vs y officers for an Escape on Mesne Process, his return of a Rescue is conclusive. But Pltff may sue him for a false return. for such official acts can't be falsified. except by a proceeding, wh in its nature necessarily puts ym directly in Issue and wh is prostituted for yt purpose — Cro C. 781. Cum. 1. 295. 1 Vent 224. 2 Ro 175.

4 Bac 404.

In Court. it may be disputed in y Original action.

The Shff may also have Case vs y Rescuers, but

yo P suppose, is only in cases, in wh he liable recs to y Plff. P not in case of an arrest on Mesne Process. ante 21. See Trespass. on y Case. 10.1.
4 Bac 390. Cro C 109. Str. Hutt 98. Hob. 180.
If a Shff bring out a prisoner on "Habeas Corpus" rescue is no Excuse. Str 482. Ep D. 610.
Except in case of Public enemies
If a person arrested, is actually committed, even on Mesne process. nothing but y act of God or y public enemies will excuse y Shff in case of an Escape. Ep D. 610. 4 Co 84. a. 2. H BL 113. 4. T R 789.

Fire caused otherwise yn by lightning, is no Excuse.
La. C. Gordons. 1783. not fire in London. 1666.

Here y prisoners were released, but Parliamt made a Special St to exempt y Shff. as y fire wasn't caused by lightning.

Difference between y consequences of Voluntary and Negligent

Even formerly holden yt in case of voluntary Escape, y prisoner was absolutely discharged from y debt. or liability for wh he was arrested. and yt his liability was entirely transferred to y Sheriff. Hob 202. 2 Bac 203.
But yo ant Law. y. Plff. as y nature of y case may require, may (if y arrest was on Final Process) have a new action of debt vs him. Or by Sci Fa. a new execution on y original Judgmt.
1 Bac 190. 1 Rents 4. 3 Co. 415. Hob. 60. 1 Saki 330 a 31. 2 Mod 186.
2 Do. 240.1. 415

And now by St 8. & 9. W. Will. Mary. 3d a new Execution may issue on y original judgmt. without a Sci Facias, by a Mere Affidavit.
It ta seems. y Plff may retake him on y original Cause at C Law.
This being a Mod. St. ant our Law.

By y committmt (i.e. in case of voluntary escape) was in Mesne process. y Pltff may retake by an Escape Warrant. Esp D. 611. 3 Co 52. B. 2. Wil 295. Esp D. 611.

But y officer suffering a voluntary escape, cant retake or maintain an action vs y Escaper. for he's "particeps Criminis". 3 Co 52. 1 Seli 330. 2 TR 176.
3 Bl 415.

And if y officer suffering a voluntary escape, does retake, he is guilty of false imprisonmt. The Escaper is entitled to a Writ of "Habeas Corpus" 2 T R 176. 2 Vent 269.
2 Bac 246.

And a bond to save Shff harmless of such an Escape, i.e. voluntary one, is void as vs law.

But y Pltff may retake y escaper, even tho he has recovered vs y Goaler, if y sum recovered was less y n y debt. i.e. P.G. thinks of y. was not debt. if it was debt he recovers y whole.
Bule N P. 69. Esp D. 511.

Suppose y whole debt and costs recovered may he not still retake. vide Pleading 117.

May y Pltff not always retake on recovery vs y escaper. when he has recovered damages vs y Shff. of whatever amt.? i.e. always in when y recovery vs y Shff. was in debt. on y St of Westmr 2.d Pc. ante.

But in case of a negligent escape, y Shff may retake or have an action on y case vs him. immediately for escaping. for y Shff is liable for y Pltff. and ant "Particeps Criminis"
Esp D. 612. B. 1 Bac 45. 6. Cro E. 234. 3 Co 52. B.

385.

Or if a bond has been given vs a negligent Escape, he may sue upon it. 1 Root 151.

But y Shff's bailiff (Bailif is only a Special agent) cant at C Law. have an action vs y Escaper., tho' y Shff has recovered of him: for he ant liable to y original Pltff at all
24 nor by law. to y Shff. but by his contract with y Sheriff. Cro J 343. Eth 2. 613. 7. T.R 116. 1. 2. Phillipps 218. 19.

For a discription of y office of Special Bailif. 1. Ble. 345. They are empowered to make arrests thro' Hundred.

Quere. If y Bailif has been compelled to pay money for y escape, may he not recover it in "indebitatus assumsit" for money paid and laid out. pc for y use of y Escaper.? Semble not. Tis like any individual contracting to indemnify another vs y wrongs of a 3d person.

The Escaper may be taken by an Escape Warrant in another State. 1 Root 107.

Quere for ys ant like y case of Bailes retaking under a bail piece. 1. Root 107.
The right is founded exclusively on y Process. wh cannot run out of y State.

If a person arrested on Criminal process, escape, he is punishable by Fine. and imprisonment, and for prison breach. he is guilty of Felony 4 Bl 129. 35 2 Hawk 122. 8.

Is y latter rule enforced in Mod. practice? I g. says not. They at least, seem obsolete now? In Felony.

Officers who after an Arrest suffer a negligent Escape of a Felon, are punishable by Fine.
But for Voluntary Escape, they are punishable as y offender is, being considered as accessories after y Fact.
But they are punishable as accessories, tile sentence passed on y original Delinquent. 1 Hale 590. 2 Hawk 134. 4 BC. 130.

But before conviction of y principal, y officer may be fined and imprisoned as for a Misdemeanor 4 BC 130. for in yse cases y Crime or Misdemeanor is Primary.

If for a negligent escape, y Shff has been compelled to pay y debt, he may doubtless maintain on y Escape Indebitatus ass. for money paid &c.
And y same point has been decided at Nisi Prius, when y Escape was Voluntary in y Gaoler or Deputy.
Decided Contra by La Fenore. Cp 612. Poa 140.

Query are y 2 first cases at Nisi Prius, and correct on principle, when y Escape (the voluntary is permitted by y under officer?

If after negligent escape, y Shff retake y Prisoner, on fresh Suit, before action on himself, his liability to Pltf is discharged, & any taking before action but on Shff. is a taking on fresh Suit, or in pursuit.
[illegible] 2 Str 848. 3 Co 44. 52. 2 Ld 120.
1 Bents 26. 1. Bp. D. 011.

Fresh Suit is superfluous if he be taken at any time, before suit vs himself. It must however be pleaded Specially in England.
Secus in Comm.

But if ye action vs ye Shff. is brot before recaption, a subsequt recaption don't discharge him. for bringing ye action ye Pltff attaches in himself a right of Recovery. 2. Str 873 Co Ent 85.
3 Co 44. 51. 1 Rol 808. Ep D. 611

A Voluntary Return of ye Prisoner into custody, before action vs ye Shff. is equivalent to Recaption in fresh Suit. Com. R 557. 2 Ll 126. 1 Bot 413

But in case of a voluntary Escape, retaking is no Excuse. for ye Shff. he has no right to retake for a party permitting a voluntary Escape, is "Particeps Criminis" & besides a pledge a right of Custody, once voluntarily abandoned or suspended, is relinquished for ever. 2 Mly 294. 3 Co 52. B. Ep D. 611. 12. 1 Salk 277.
Ep D. 612.
He wd be Guilty of False Imprisonmt. "ante".

And in such case a voluntary return don't save ye Shff.

Nor will a subsequt assent by ye Pltff in ye action, purge a voluntary Escape. He may still sue ye Shff or retake ye party.

But if y Escape is negligent, y Shff may for his own security, retake even after action brot vs him.
1 Keb 82.

26. If after a negligent Escape y Pltff in y process discharge, y escapee, y Gaoler y Shff cannot retake him for his fees, tho' he might have retained him for his Fees, for by Escape his lien is lost — as y loss of his actual custody is deemed to have been, by his own fault or neglect. Str 915. Esp D. 611.

On a negligent Escape of a prisoner, having y liberty of y prison yard, a retaking on fresh Suit, or a voluntary return before action brot, saves y Shff.
1. Root 106.7.

Yet may in such case, as y last, recover nominal damages, on y bond of indemnity, for y condition is broken. 1. Root 107. If after such escape neither y Prisoner nor y Bondman, can compel y Shff to receive y former, — he has a right to enforce y bond, y penalty being forfeited at C Law. 1 Root 127.8.

He recovers only nominal damages generally, for he ant liable to y Pltff.

But y bondsman ant liable in y last case to y Shff. for y debt due from y Escaper after y Pltffs remedy vs y Shff is barred, as by y St of Limitations. tho y prisoner ant retaken. 1. Root 151) And if y Judgmt for y Deff. vs y bondsman, before "audita Querela" lies, for y object of y bond is to indemnify y Shff. vs y claims of y original Pltff, and in y case

supposed, yt action is barred. 1. Root 187.

Under a count for a voluntary escape, ye Plff may give a negligent Escape, in Evi and Def may of course plead to such count, a retaking on fresh pursuit without traversing ye arrest, yt ye Escape was voluntary. 1 Vent 211. 2 TR 126.
How then is ye Pltf to avail himself of ye distinction between a negligent and voluntary Escape.
In his replication, by way of new assignment. of the escape 1 be as a voluntary Escape.

It is impertinent to state it voluntary in ye decl.n_ it shd come out in ye replication. in answer to any defence yt may be made as a Negligent Escape, 1 Vent 217. 2 Bac 248.
2 T R 126.

For a voluntary escape, ye under Shff or Gaoler is liable. Cowp 403. Esp D. 603.
But after ye Pltf in ye process sue ye under Shff, ye Shff seems excused. Esp D. 612.

If upon action writ vs ye Shff, for an Escape & before ye original judgmt vs ye Escaper is reversed. ye Shff may defeat ye action by pleading to ye original Judgmt. Nul Tiel Record.

But if after Judgmt and Exd vs ye Shff, ye original judgmt is reversed, ye judgmt vs ye Shff stand, goods — it cant be reversed. 2 Bac 40. 248.
3 Mod 325. Hob. 209 8 Co 142. B

Quere? may he not be relieved in ye Execution by "audita Querela" So it seems. 8 Co. 143. B.
This is a Writ vs a Judgmt discovered unjust "by Matter Ex post Facto" A voluntary Escape works ye forfeiture of ye Sheriffs office, or Mr Shff. if he is guilty. Secus if negligent.

False Returns and Miscellaneous Rules

If a Shff make a false return, he is liable to an action on ye Case, in favour of ye Party aggrieved ante 22. As return of Service on ye Def. when there has been none. Ditto Def may sue him. 1 Mod 336. Cro. D. 615

In Comm. Pltf may sue if Def answer ye return as by Comm practice he may in plea to an abatemt. for Pltf is then ye suffering party.

So of a False return of "non est inventus" ye Pltf in ye process may sue.
upon False return of upon Execution, action on case.
" Cro J 616. Str 650 Cro Eliz 729.
So of Nulla Bona.

County's liability for Escapes in Comm.

In Comm. if a prisoner escape thro ye insufficiency of ye Goal ye County is by ye made Liable for him. Tis ye duty of ye County and not of ye Shff to keep ye ye Gaol in repair. 1 Rool 450.

By ye Law Shff is liable in such case. 1 Co 84. a
Cro J 10 1 R.A Str 482.

Ct of C Pleas.

The remedy in Conn to y petition to y County Ct, & not y action: & appeal by petition is allowed by Sup. Ct. Conn St 223. Ath St Sess. 8. Kirby 318. 1 Root 155. 8. 275. 8. 35th. 450. 505. 2 Do 31.

In Conn in General y liability of y County (according to their decisions, is but nominal: for it is holden yt if y debtor is responsible, y Creditor must pursue his remedy on him: and if not y creditor suffers no actual loss by y Escape. and therefore can recover only nominal damages. So yt County is virtualey made liable in ordinary cases only, for y Special damage actualy sustained. Swift Dig.

P. G. cannot reconcile ys to y rule of Justice.

If however y person escaping is of ability at y time of y Escape. & by means of y Escape is enabled to demand y County, I suppose, wd be subjected to y whole debt. If Escape by means of External assistance, y Goal being otherwise sufficient, y County ain't liable. 2 Root 195.

In Conn in those cases of Escape thro' y insufficiency of y Goal, y Shff wd be also liable, if y escape were facilitated by any actual negligence in him or y Gaoler.

Effects of discharging from Execution.

1 TR 557. 4 Bun 2482. 8 TR 123. 7 Do 420 6 Do. 325. If a Creditor voluntarily discharges from custody a debtor taken in Execution, on committed or not, he can never afterwards retake him nor in any way enforce his Judgmt. 1. Str 653. Ch Bill, 182.

'Tis a discharge of y debt, y body in Execution being deemed for y time being, a satisfaction and y Shff having

taken his highest remedy, must abide by it.

And tho' y discharge were in consideration of a new promise by y Def. to pay. & y promise is broken, y Rule is y same. He can't be retaken nor sued in debt on y Judgmt, but on y promise he may be.
4 Burr 2482. 1 TR 55. 6. TR 525. 7. Do. 420.
2 East 243.

And y Judgmt is satisfied by thus enlarging y Def, even tho' y new agreament sha be defeated afterwards for Informality. 1 TR 557. 6. Do 525.

And a bond conditioned for y rendering Eccta of a person overtaken, upon it & released by y Pltff, is void as being vs Law. Tis a bond for False Imprisonment.
1. B et P. 242. 2. East 223. 2 R
But in Connt, such a bond has been held good.
2 Rost 133.
This determination is directly opposed to y rule of y Law.

30. If 2. Jt Debtors are taken in Eccta, a release of one from Lt Ray y custody of y Pltff, is a release of y whole debt. 1 Saulk 93. Salk 574.
If originally joint and Several, y debt becomes joint Bos & P. 557.
by Judgmt vs both. Ch Bills 82. 5 Bos & P. B.
Each one in Law being bound y whole —

Suppose one of 2. Jt and Several sued alone, taken in Execution & enlarged by y Pltff, is y Def quoad y other discharged, y recovery being as of a Several debt?

2 Bl R 1235 4 T R 825 Ch B. 115. 124. 2 Show 481.

But under y Law Merchant, y holder of a bill &c after having taking one Indorsee in Exn and discharged him in Custody without actual satisfaction, may sue another. for they are not Pt Debtors – each is bound independently of y Rest.

It was formerly decided yt if a Sole Def imprisoned on Exn died in prison, y debt was forever relinquished, on y ground yt y Pltff had elected his highest remedy & ought to be bound by it. Hob. 52. Cro Eliz 850. Cro J. 136-143

Tho' if one of 2. Pt debtors, thus imprisoned, died, y debt as to y other was always not to be discharged. 5 Co 86. Cro Eliz 850. Cro J. 130. 143-

And by y St 21. James. 1. tis "declared, explained & enacted" yt when a Sole Def dies in prison, y Pltff may sue out a new Exn vs y State of y Deceased, as if there had been no prior Exn.

2 Bac 354. Tidy 88

This is a Parliamentary declaration yt y former was not Law.

31. A Penal bond* given by a prisoner to y Shff conditioned, yt y (* a bond for ease and favour) obligor shall remain a true prisoner till y debt fees and Expences of board are paid, is wholly void. – it being as to y Board and Fees vs y St. 1 Vent 23. 1 Pow C. 173. 12 Mod 683. Hob. 14. 1 P Wms 135. 12 Mod 159. 10. Co 100. b.

2 Mly 357.

But y St contemplates only Penal obligations, wh may enable y Shff to oppress y prisoner, by a forfeiture of y Penalty. "Contract 26."

The Sup. Ct in Comm seems to have adopted y idea, yt it is void as to y board only. 1 Root 158.

Wd it not be considered wth the Principle in Comt, to consider ye bond good in toto, as penalties may there be cancelled, in all cases in Obs of Com Law.

All prisoners are by ye E Law to support themselves, in felons attainted. They are deemed incapable of supporting themselves, as their property is forfeited.

Crow 58. 1 Hod 132. 1 Do 053.

The Eng St Law mitigated ye Law in ye case of poor persons.

In Comt, prisoners are in Civil Suits obliged to bear their own Expenses. in admitted to ye "poor man's oath" wh is yt he ain't worth 17. Dolls. after ye oath of he ain't supplied with a weekly maintenance 1E. money ratis to pay his board and lodging, he may be discharged. The creditor is allowed to prove yt ye prisoner is worth 17. Dolls. This rule or law is adopted by Congress. in yt ye sum is 17. Dolls.

Fees of Sheriff and Goaler.

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GEORGE MAN